DOCKET

No. 13-975

Title: T-Mobile South, LLC, Petitioner
v.
City of Roswell, Georgia

Docketed: February 18, 2014

Linked with 13A614

Lower Ct: United States Court of Appeals for the Eleventh Circuit

Case Nos.: (12-12250)

Decision Date: October 1, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 13 2013	Application (13A614) to extend the time to file a petition for a writ of certiorari from December 30, 2013 to February 13, 2014, submitted to Justice Thomas.
Dec 20 2013	Application (13A614) granted by Justice Thomas extending the time to file until February 13, 2014.
Feb 12 2014	Petition for a writ of certiorari filed. (Response due March 20, 2014)
Mar 19 2014	Brief of respondent City of Roswell, Georgia in opposition filed.
Mar 20 2014	Motion for leave to file amicus brief filed by Competitive Carriers Association.
Mar 28 2014	Reply of petitioner T-Mobile South, LLC filed.
Apr 2 2014	DISTRIBUTED for Conference of April 18, 2014.
Apr 21 2014	DISTRIBUTED for Conference of April 25, 2014.
Apr 28 2014	DISTRIBUTED for Conference of May 2, 2014.
May 5 2014	Motion for leave to file amicus brief filed by Competitive Carriers Association GRANTED.
May 5 2014	Petition GRANTED.
Jun 3 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 3, 2014.
Jun 3 2014	The time to file respondent's brief on the merits is extended to and including August 18, 2014.
Jul 1 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 3 2014	Joint appendix filed. (Statement of costs filed.)
Jul 3 2014	Brief of petitioner T-Mobile South, LLC filed.
Jul 3 2014	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondent.
Jul 10 2014	Brief amicus curiae of the United States in support of neither party filed.
Jul 10 2014	Brief amicus curiae of Competitive Carriers Association filed.
Jul 10 2014	Brief amici curiae of The Chamber of Commerce of the United States of America and

	National Federation of Independent Business filed.
Jul 10 2014	Brief amicus curiae of PCIA -The Wireless Infrastructure Association filed.
Jul 10 2014	Brief amicus curiae of CTIA - The Wireless Association filed.
Jul 10 2014	Brief amicus curiae of TowerCom V, LLC filed.
Aug 18 2014	Brief of respondent City of Roswell, Georgia filed.
Aug 25 2014	Brief amici curiae of National League of Cities, et al. filed.
Aug 25 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 4 2014	SET FOR ARGUMENT on Monday, November 10, 2014.
Sep 8 2014	Record requested from U.S.C.A. 11th Circuit.
Sep 8 2014	Record received from U.S.C.A. 11th Circuit is electronic and located on PACER.
Sep 9 2014	Record received form U.S.D.C. Northern District of Georgia is electronic and located on PACER.
Sep 17 2014	Reply of petitioner T-Mobile South, LLC filed. (Distributed)
Sep 19 2014	CIRCULATED
Oct 2 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 8 2014	Supplemental brief of respondent City of Roswell, Georgia filed. (Distributed)
Nov 10 2014	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Ca. For United States, as amicus curiae: Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Richard A. Carothers, Buford, Ga.
Jan 14 2015	Judgment REVERSED and case REMANDED. Sotomayor, J., delivered the opinion of the Court, in which Scalia, Kennedy, Breyer, Alito, and Kagan, JJ., joined. Alito, J., filed a concurring opinion. Roberts, C. J., filed a dissenting opinion in which Ginsburg, J., joined, and in which Thomas, J., joined as to Part I. Thomas, J., filed a dissenting opinion.
Feb 18 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

13-975

No. 13-____

Supreme Court, U.S.
FILED
FEB 12 2014
CLERK

IN THE

Supreme Court of the United States

T-MOBILE SOUTH LLC

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In order to promote the prompt deployment of telecommunications facilities and to enable expedited judicial review, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any decision by a state or local government denying a request to place, construct, or modify a personal wireless service facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

The question presented is whether a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory "in writing" requirement.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner T-Mobile South LLC states that T-Mobile South LLC is a Delaware limited liability company and wholly-owned subsidiary of T-Mobile USA, Inc. T-Mobile USA, Inc. is a Delaware corporation and is a wholly-owned subsidiary of T-Mobile US, Inc. T-Mobile US, Inc. is a Delaware corporation, and is a publicly-traded company listed on the New York Stock Exchange (traded under the symbol TMUS). Deutsche Telekom Holding B.V., a limited liability company (*besloten vennootschap met beperkte aansprakelijkheidraies*) organized and existing under the laws of the Netherlands ("DT B.V."), owns more than 10% of the shares of T-Mobile US, Inc. DT B.V. is a direct wholly-owned subsidiary of T-Mobile Global Holding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany ("Holding"). Holding, is in turn a direct wholly-owned subsidiary of T-Mobile Global Zwischenholding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany ("Global"). Global is a direct wholly-owned subsidiary of Deutsche Telekom AG, an Aktiengesellschaft organized and existing under the laws of the Federal Republic of Germany ("Deutsche Telekom"). The principal trading market for Deutsche Telekom's ordinary shares is the Frankfurt Stock Exchange. Deutsche Telekom's ordinary shares also trade on the Berlin, Düsseldorf, Hamburg, Hannover, München and Stuttgart stock exchanges in Germany. Deutsche Telekom's American Depositary

Shares ("ADSs"), each representing one ordinary share, trade on the OTC market's highest tier, OTCQX International Premier (ticker symbol: "DTEGY"). Deutsche Telekom is an indirect parent of Petitioner T-Mobile South LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner T-Mobile South LLC ("T-Mobile") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 731 F.3d 1213 and is reproduced at Pet. App. 1a-18a. The relevant opinion of the district court is unpublished and is reproduced at Pet. App. 19a-35a.

JURISDICTION

The Eleventh Circuit issued its opinion on October 1, 2013. Pet. App. 1a. On December 20, 2013, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including February 13, 2014. See No. 13A614. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c)(7), provides in relevant part:

(B) LIMITATIONS.

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

INTRODUCTION

This case presents a repeatedly acknowledged circuit split over a provision of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (collectively the "Act") that is implicated in countless cases – involving any of the approximately 89,000 local authorities across the Nation – every day. Intended to jump-start the deployment of advanced wireless services and remove local obstacles to timely deployment, Section 332(c)(7)(B)(iii) of the Act specifies that any local government's denial of an application for the placement, construction, or modification of a personal wireless facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

According to the majority of the federal courts of appeals to address the issue, this provision dictates that an issuance denying such an application must be separate from the administrative record and "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *accord New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *Helcher v. Dearborn Cnty. Bd. of Zoning Appeals*, 595 F.3d 710, 718-19 (7th Cir. 2010); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 722-23 (9th Cir. 2005). But in the decision below, the Eleventh Circuit expressly "rejected" that view and instead joined the Fourth Circuit in holding that a denial letter need only advise the applicant of the fact that the permit has been denied. Pet. App. 12a-14a.

"[T]o the extent that the decision must contain grounds or reasons or explanations," the Eleventh Circuit held that "it is sufficient" if those reasons are purportedly embedded in the administrative record. Pet. App. 13a.

This Court's review is urgently needed to bring uniformity to the law, and this case is the perfect vehicle for doing so. The issue presented is of enormous importance to the Nation's economy – particularly as demand for advanced wireless services continues to surge. The interpretation of Section 332(c)(7)(B)(iii) adopted by the Eleventh and Fourth Circuits not only badly misreads the statute but also, if left to stand, will seriously impede the prompt deployment of wireless services to consumers. In particular, under the Eleventh Circuit's approach, applicants will be forced to engage in the costly and time-consuming process of filing suit to ferret out the underlying reasons for permit denials; and judicial review will be vastly complicated as courts are required to sift through sometimes hundreds or thousands of pages of hearing minutes, transcripts, and correspondence simply to discover the threshold question of the grounds of the local government's decision. Requiring such time-consuming and expensive undertakings directly conflicts with Congress' intent in passing the Telecommunications Act of 1996.

STATEMENT OF THE CASE

1. The United States is rapidly becoming a technologically mobile society. Every year, consumers adopt more wireless telecommunications services. To provide the advanced wireless services that consumers demand, wireless

telecommunications providers must deploy increasingly tightly stitched networks of equipment, such as towers and antennas, to reach the places where consumers live and work. The local government approval process, however, can delay and impede deployment of that necessary infrastructure by "creat[ing] an inconsistent and, at times, conflicting patchwork of requirements." H.R. Rep. No. 104-204, pt. 1, at 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61 (1996). As a result, "zoning approval for new wireless facilities" has historically been "both a major cost component and a major delay factor in deploying wireless systems." *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, Report and Order, 12 FCC Rcd. 10785, ¶ 90 (1997).

Congress enacted the Telecommunications Act of 1996 ("1996 Act"), at least in part, to address this problem of "impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). In general terms, the 1996 Act radically altered the communications markets and their regulation "to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *Id.* (quoting Telecommunications Act of 1996, Pub. L. No. 104-104, preamble, 110 Stat. 56 (1996)). Specific to this case, the 1996 Act amended the Communications Act of 1934 to "impose[] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.*; *see generally City*

of Arlington v. FCC, 133 S. Ct. 1863, 1866-67 (2013). That statutory amendment provides, in part, that any decision by a local authority to deny a wireless siting application for a personal wireless facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). This case turns on the meaning of that requirement.

2. In early 2010, Petitioner T-Mobile determined that it needed an additional personal wireless service facility in a residential area in Respondent the City of Roswell, Georgia (the "City"). T-Mobile thus applied to the City for a permit to construct a cell tower disguised as a pine tree on a 2.8-acre, vacant parcel of property. The Planning and Zoning Division of the City's Community Development Department reviewed T-Mobile's application and found that it met all the requirements of the City code's standards for wireless facilities. Pet. App. 4a. The Planning Department further recommended that the City approve the application with certain modifications. *Id.*

Shortly thereafter, the City Council considered the application at a public hearing. The hearing lasted over two hours and comprises 108 pages of transcript. During the first part of the hearing, some T-Mobile representatives and local residents spoke for and against the proposal. Later, certain councilpersons expressed concern or outright opposition to the application. They suggested, among other things, that "other carriers apparently have sufficient coverage in this area"; that the cell tower would be "aesthetically incompatible with the natural setting and surrounding structures"; that the cell

tower might not be able "to provide continuous emergency power for 911 services"; and that it was "difficult really to definitively assess" the "potential loss of resale value" among surrounding homes. Pet. App. 7a-8a, 28a-29a. Another councilperson simply asked follow-up questions of T-Mobile, and a final councilperson never spoke at all. Pet. App. 28a.

At the end of the meeting, one councilperson moved to deny the application, and the members who were present and eligible to vote unanimously passed the motion. No one ever identified which of the various concerns expressed at the meeting and in support of the motion constituted the City's official reasons for denying the permit.

Two days later, the City mailed T-Mobile a letter. The letter stated in full:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number]. If you have any additional questions please, contact me at [phone number].

Pet. App. 9a. Once again, the City in the letter made no attempt to distill from the varying views expressed by the individual council members any common rationale for the denial reflecting the decision of the council as a whole. Pet. App. 9a.

3. Section 332(c)(7)(B)(v) of the Act affords telecommunications providers thirty days after the denial of a permit to seek judicial review in federal court and requires the court to act on the matter in an expedited manner. 47 U.S.C. § 332(c)(7)(B)(v). Accordingly, T-Mobile timely filed an action in the U.S. District Court for the Northern District of Georgia, challenging the City's denial of its application. Among other provisions of the Act, T-Mobile contended that the City's unexplained denial letter violated Section 332(c)(7)(B)(iii)'s requirement that denials be "in writing and supported by substantial evidence."

The district court granted summary judgment to T-Mobile and ordered the City to allow T-Mobile to install its wireless communications facility. Reading the statutory phrase "in writing and supported by substantial evidence" in context, the district court followed the interpretation of Section 332(c)(7)(B)(iii) adopted by a majority of federal courts of appeals that have addressed the issue. Those courts (four in all) have held that this provision requires a written denial to "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *see also supra* at 3 (collecting other cases). Thus, "[e]ven where [a written administrative] record reflects unmistakably [a] Board's reasons for denying a permit, allowing the written record to serve as the writing would contradict the language of the Act." *Id.* Because the City's denial letter here failed to cite any "specific reasons for the local government's decision,"

the district court held that it violated Section 332(c)(7)(B)(iii). Pet. App. 10a, 34a.

4. The Eleventh Circuit reversed. The court of appeals did not dispute that under the majority interpretation of Section 332(c)(7)(B)(iii) T-Mobile would prevail. But, reaffirming its intervening decision in *T-Mobile South LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the Eleventh Circuit expressly rejected the majority construction of Section 332(c)(7)(B)(iii). Pet. App. 14a; *see also City of Milton*, 728 F.3d at 1284 (acknowledging its decision deepened a "disagree[ment]" among the circuits). Joining the Fourth Circuit, the Eleventh Circuit held that a written document announcing the bare conclusion that an application was "denied" can satisfy Section 332(c)(7)(B)(iii). The Eleventh Circuit added that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." Pet. App. 13a (quoting *City of Milton*, 728 F.3d at 1285).

The Eleventh Circuit ruled that the City had satisfied its standard. The City sent T-Mobile a letter advising that its application had been denied, and it "informed T-Mobile that '[t]he minutes from the aforementioned hearing may be obtained from the city clerk.'" Pet. App. 15a. And those minutes, the Eleventh Circuit believed, "'recount[] all of the reasons for the action on [the] application along with the relevant discussion.'" *Id.* 15a (quoting *City of Milton*, 728 F.3d at 1286) (internal alterations made by Eleventh Circuit).

The Eleventh Circuit remanded to the district court for further proceedings on T-Mobile's remaining claims. Pet. App. 18a.

5. The Eleventh Circuit subsequently denied T-Mobile's petition for rehearing en banc in the *City of Milton* case, thus locking in its construction of Section 332(c)(7)(B)(iii).

REASONS FOR GRANTING THE WRIT

I. The Federal Circuits Are Intractably Split Over What Section 332(c)(7)(B)(iii) Requires.

The federal circuits are divided four-to-two over what it takes to satisfy the "in writing" portion of Section 332(c)(7)(B)(iii)'s requirement that any decision denying a request to place, construct, or modify a personal wireless service facility "be in writing and supported by substantial evidence contained in a written record."

1. The First, Sixth, Seventh, and Ninth Circuits hold that Section 332(c)(7)(B)(iii) requires a denial of a permit application to "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Todd*, 244 F.3d at 60; *accord New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002) (adopting *Todd* rule); *Helcher v. Dearborn Cnty. Bd. of Zoning Appeals*, 595 F.3d 710, 718 (7th Cir. 2010) (same); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 722 (9th Cir. 2005) (same). And at least in the First, Sixth, and Ninth Circuits, "[e]ven where [a written administrative] record reflects unmistakably [a] Board's reasons for denying a permit, allowing the written record to serve as the writing would

contradict the language of the Act." *Todd*, 244 F.3d at 60; *see also New Par*, 301 F.3d at 395 (denial must "(1) be separate from the written record; [and] (2) describe the reasons for the denial"); *MetroPCS*, 400 F.3d at 723 ("local zoning authorities [must] issue a written decision separate from the written record which contains sufficient explanation of the reasons for the decision" to allow judicial review).[1] Decisions thus abound in those jurisdictions holding that local governments violated Section 332(c)(7)(B)(iii) where, as here, written denials advised nothing more than the fact of the denial.[2]

Several other courts have adopted this view as well. The Tenth Circuit applied it in *U.S. Cellular Corp. v. Bd. of Adjustment of City of Seminole*, 180 F.

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[1] In *Helcher*, the Seventh Circuit expressly "join[ed] the First, Sixth, and Ninth Circuits[']" construction of Section 332(c)(7)(B)(iii). *Id.* at 595 F.3d at 719. Yet it held that this construction was satisfied by meeting minutes "cit[ing] the specific provisions of the [local o]rdinance that the majority of the voting members found were not met by the application." *Id.* at 722.

[2] *See, e.g., New Cingular Wireless, PCS, LLC v. Town of Candia*, 2010 WL 3211067 (D.N.H. Aug. 11, 2010); *Indust. Tower & Wireless, LLC v. Town of East Kingston*, 2009 WL 799616 (D.N.H. Mar. 26, 2009); *SBA Towers II, LLC v. Town of Atkinson*, 2008 WL 4372805 (D.N.H. Sept. 19, 2008); *Nextel Commc'ns of the Mid-Atlantic, Inc. v. Town of Randolph*, 193 F. Supp. 2d 311 (D. Mass. 2002); *ATC Realty, LLC v. Town of Sutton*, 2002 WL 467132 (D.N.H. Mar. 7. 2002); *Cellco P'ship v. Franklin Cnty.*, 553 F. Supp. 2d 838 (E.D. Ky. 2008); *New Par v. Franklin Cnty. Bd. of Zoning Appeals*, 2010 WL 3603645 (S.D. Ohio Sept. 10, 2010); *T-Mobile Cent., LLC v. City of Grand Rapids*, 2007 WL 1287739 (W.D. Mich. May 2, 2007).

App'x 791, 793-94 (10th Cir. 2006).[3] District courts within the Second and Eighth Circuits also have construed Section 332(c)(7)(B)(iii) in accordance with the majority view. *See Omnipoint Commc'ns, Inc. v. Planning & Zoning Comm'n of Wallingford*, 83 F. Supp. 2d 306, 309 (D. Conn. 2000); *Sprint Spectrum L.P. v. County of St. Charles*, 2005 WL 1661496, at *3-5 (E.D. Mo. July 6, 2005).

The courts adopting this view have relied on both text and the statute's purpose. The Ninth Circuit has stressed that the statutory provision's "in writing" directive must be read in conjunction with the requirement that any denial be "supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). "If such an evidentiary review is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record." *MetroPCS*, 400 F.3d at 722. The First Circuit has echoed this concern, stating that "permitting local boards to issue written denials that give no reasons for a decision would frustrate meaningful judicial review, even where the written record may offer some guidance as to the board's rationale." *Todd*, 244 F.3d at 60. An administrative record alone "can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members

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[3] Unpublished decisions in the Tenth Circuit are not precedential, but may be cited for persuasive value in that circuit. 10th Cir. L. R. 32.1(A).

rather than a statement of the reasons that commanded the support of a majority of the board." *Id.*

2. In its decision below, the Eleventh Circuit expressly "rejected" – and thus "refused" to follow – the majority approach. Pet. App. 14a. Joining the Fourth Circuit and reaffirming its own precedent, the Eleventh Circuit held that a written document announcing the bare conclusion that an application was "denied" can satisfy Section 332(c)(7)(B)(iii). Pet. App. 14a-15a; *see also City of Milton*, 728 F.3d at 1283-84; *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-13 (4th Cir. 1999). The Fourth Circuit has held that such a document alone always satisfies Section 332(c)(7)(B)(iii). *See Winston-Salem*, 172 F.3d at 311-13 (holding that it was sufficient that the zoning board sent the applicant a copy of the first page of its application with the word "DENIED" stamped on it). The Eleventh Circuit has also stated that "to the extent that the [local government's written] decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents" – such as meeting minutes or a transcript of the hearing at which the permit application was denied – "that the applicant is given or has access to." Pet. App. 13a (quoting *City of Milton*, 728 F.3d at 1285). Those separate documents – as this case illustrates – need not specify which particular arguments voiced in opposition to the application actually carried the day.

3. At this point, the circuit split over the proper interpretation of Section 332(c)(7)(B)(iii) is deeply entrenched and fully developed. The First Circuit

acknowledged in *Todd* that it was rejecting the Fourth Circuit's view as "flawed" and because it believed it "contradict[ed] the language of the Act." 244 F.3d at 60. And every court of appeals to address the issue subsequently has recognized that "the circuits are split in their interpretations of the 'in writing' requirement." *MetroPCS*, 400 F.3d at 721; *see also City of Milton*, 728 F.3d at 1284 ("Other circuits have disagreed with the Fourth."); *Helcher*, 595 F.3d at 717 ("There are differing views among the circuits as to what constitutes an adequate writing."); *New Par*, 301 F.3d at 395 ("Courts have varied considerably in their interpretations of the 'in writing' requirement of 47 U.S.C. § 332(c)(7)(B)(iii).").

Furthermore, the First Circuit's *Todd* decision largely encapsulates the reasoning of one side of the conflict, while the Fourth Circuit's *Winston-Salem* decision basically describes the other. Courts of appeals weighing in after those two decisions have simply chosen sides. Nothing could be gained by further percolation – a reality perhaps evidenced by the fact that the Eleventh Circuit recently denied T-Mobile's request (in the *City of Milton* case) for rehearing en banc on the issue.

II. The Question Presented Is Important And Should Be Resolved Now.

For two overarching reasons, there is a pressing need for this Court to resolve the conflict over whether local governments may deny applications for personal wireless service facilities in documents that do nothing more than advise the applicant of the fact of the denial.

1. The statutory provision at issue in this case is central to the deployment of facilities and services that are a critical component of the Nation's economy. The Federal Communications Commission ("FCC") has explained that:

> Wireless services are central to the economic, civic, and social lives of over 270 million Americans. Americans are now in the transition toward increasing reliance on their mobile devices for broadband services, in addition to voice services. Without access to mobile wireless networks, however, consumers cannot receive voice and broadband services from providers.

Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, 24 FCC Rcd. 13994, ¶ 3 (2009) ("*2009 Declaratory Ruling*"); *accord Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, ¶ 2 (2013) ("*2013 Wireless Broadband NPRM*") ("The ability of wireless providers to meet" the rapidly growing demand for wireless broadband services "will depend not only on access to spectrum, but also on the extent to which

they can deploy new or improved wireless facilities or cell sites.").[4]

Indeed, robust deployment is critical if the United States is to keep up with its international counterparts in access to advanced broadband services, with all of the benefits that such access entails. *See, e.g.,* Edward Wyatt, *U.S. Struggles to Keep Pace in Delivering Broadband Service*, N.Y. Times, Dec. 29, 2013, at B1. One recent study, for instance, predicts that continued deployment of our Nation's wireless infrastructure would increase the GDP in 2017 by 1.6% to 2.2% ($259.1 to $355.3 billion in dollar terms) and generate up to 1.2 million net new jobs. *See* Alan Pearce, et al., *Wireless Broadband Infrastructure: A Catalyst For GDP And Job Growth 2013-2017*, at 1 (Sept. 2013), *available at* http://www.pcia.com/images/IAE_Infrastructure_and_Economy2.PDF.[5]

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[4] The Executive Branch also has repeatedly recognized the importance to the Nation of deployment of advanced wireless services and identified the need for improvement in the availability of access to broadband services – including specifically wireless broadband services. In his 2011 State of the Union Address, for example, President Obama called for a national wireless innovation and infrastructure initiative to make available high-speed wireless services to at least 98% of Americans. President Barack Obama, State of the Union Address (Jan. 25, 2011); *see also* Presidential Memorandum: Unleashing the Wireless Broadband Revolution (June 28, 2010).

[5] *See also 2013 Wireless Broadband NPRM*, 28 FCC Rcd. 14238, ¶¶ 1, 91, Appendix B ¶ 33 (citing *inter alia*, Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012), codified at 47 U.S.C. § 1455(a)); *2009 Declaratory Ruling*, 24 FCC Rcd. 13994,

It is critical, therefore, that the federal courts avoid unduly hampering such deployment. Just last Term, for example, this Court rebuffed a challenge to an FCC order setting specific deadlines within which a local government generally must act on a wireless facility application under Section 332(c)(7)(B). *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (upholding *2009 Declaratory Ruling*, 24 FCC Rcd. 13994, ¶¶ 45-48). The agency had taken this action in order to "remove uncertainty and encourage the expeditious deployment of wireless broadband services." *2009 Declaratory Ruling*, 24 FCC Rcd. 13994, ¶ 32. This Court endorsed that objective. *See City of Arlington*, 133 S. Ct. at 1867 ("In theory, § 332(c)(7)(B)(ii) requires state and local zoning authorities to take prompt action on siting applications for wireless facilities. But in practice, wireless providers often faced long delays.").

Because the Eleventh and Fourth Circuits' interpretation of Section 332(c)(7)(B)(iii) impedes the expeditious deployment of wireless facilities, those courts threaten to hamper economic growth in a substantial part of the country and deprive consumers of the technologically advanced services envisioned by the 1996 Act. Once again, this Court's intervention is necessary to prevent such impairment.

¶ 35 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 *et seq.*, and American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009)).

2. The Eleventh and Fourth Circuits' interpretation of Section 332(c)(7)(B)(iii) also creates perverse incentives for local governments.

When Section 332(c)(7) was enacted, Congress identified the local government approval process as one of the key impediments to the rapid deployment of wireless services. As a House Committee report noted, under "current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of" wireless services. H.R. Rep. No. 104-204, pt. 1, at 95 (1995). Thus, in Section 332(c)(7)(B), Congress adopted specific procedural and substantive limitations on local governments – one of which is the requirement that any denials of permits be in writing and supported by substantial evidence. *See* H.R. Rep. No. 104-204, pt. 1, at 95; *City of Rancho Palos Verdes*, 544 U.S. at 115 (the goal of Section 332(c)(7) "was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers . . . [through] impos[ition of] specific limitations on the traditional authority of state and local governments to regulate the location, construction and modification of such facilities"); *see also City of Arlington*, 133 S. Ct. at 1873 (holding Section 332(c)(7)(B) "explicitly supplants" local authority over "matters of traditional state and local concern").

The Eleventh Circuit's and Fourth Circuit's interpretation of Section 332(c)(7)(B)(iii) encourages a return to the type of gamesmanship and delay that that provision was designed to eliminate. Local

governments in those circuits need not provide any official reason for denying applications for the deployment of personal wireless facilities. Instead, they need only send a written document with one word: "denied." Worse yet, local governments need not pinpoint anywhere else their reasons for denying such applications. And they have a strong incentive to avoid doing so. The more forthright and precise a local government is concerning the reasons for its actions, the more susceptible its denial will be to judicial review and potential rejection.

While local governments in the Eleventh and Fourth Circuits may welcome this opportunity to insulate their permit denials from prompt and effective judicial review, this regime flies in the face of the purpose of the 1996 Act. Every day the interpretation is on the books, it distorts the proper operation of permitting processes throughout a large swath of the country. This Court should step in to rectify the situation.

III. This Case Is An Ideal Vehicle For This Court To Resolve The Issue.

For two reasons, this case affords this Court a particularly suitable opportunity to resolve the legal question presented.

1. The facts of this case vividly illustrate the importance of why a local government's denial of such an application must specify reasons for the denial. As is typically the case, the local government hearing at which T-Mobile's application was considered involved testimony from various local citizens and members of the city council. But other members of the council never expressed any clear views. And no one ever made any effort to specify

which of the various concerns voiced over the two-hour-long session – at least one of which flies in the face of the Act[6] – constituted the City's official reason(s) for denying the application. Nor, most importantly, did the City's letter to T-Mobile telling it that the application had been denied identify the City's official reasons for denying the application.

For that very reason, the district court observed that "it is impossible for the Court to discern which of the[] reasons [mentioned at the hearing] motivated the Council as a whole or commanded the support of a majority of the Council members." Pet. App. 30a. The district court, in other words, found itself completely unable to undertake the review for substantial evidence that the Act demands.

It is unclear whether the Eleventh Circuit believed that the City's reasons for the denial could somehow be discerned from the administrative record. At one point, the court of appeals asserted that "the reasons for the denial could be gleaned from the written transcript and the written minutes of the hearing." Pet. App. 17a. But the Eleventh Circuit never attempted to specify those reasons, instead stating merely that "[t]he minutes in this case summarize the testimony of experts and concerned citizens, along with comments and questions from councilmembers" and "reflect the reasons given by

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[6] One councilperson asserted that "other carriers apparently have sufficient coverage in this area," Pet. App. 7a, but the FCC and numerous courts of appeals have made clear that the coverage of other carriers is not lawful grounds for denying a wireless facilities application. *2009 Declaratory Ruling*, 24 FCC Rcd. 13994, ¶ 56 (citing cases).

Councilmember Dr. Betty Price in support of her motion to deny T-Mobile's request." Pet. App. 15a.

The fact that the district judge and the appellate judges apparently disagreed, at least to some extent, over how to read the administrative record highlights exactly why other courts of appeals have held that "local zoning authorities [must] issue a written decision *separate from the written record* which contains sufficient explanation of the reasons for the decision to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *MetroPCS*, 400 F.3d at 723. This case thus affords an especially apt setting in which to consider the courts of appeals' divergent approaches to the question presented.

2. The question presented also is outcome-determinative here. The district court applied the majority interpretation of Section 332(c)(7)(B)(iii) and entered summary judgment in favor of T-Mobile because the City's written denial contained no reasoning whatsoever. Pet. App. 34a. The Eleventh Circuit did not dispute that applying the majority rule dictates that outcome. Instead, the court of appeals reversed solely because it refused to follow the majority rule. Accordingly, the validity of T-Mobile's claim that the City violated Section 332(c)(7)(B)(iii) under the "in writing" clause turns squarely and exclusively on which side of the circuit split is correct.

IV. The Eleventh's Circuit's Holding Is Incorrect.

The Eleventh Circuit reasoned here (and in *City of Milton*) that a "plain reading" of Section 332(c)(7)(B)(iii) requires local governments to do nothing more than to transmit the fact of a permit

denial "in writing." Pet. App. 12a-14a; *accord City of Milton*, 728 F.3d at 1285. Such a document, the Eleventh Circuit concluded, need not contain any reasoning; "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." Pet. App. 13a; *City of Milton*, 728 F.3d at 1285. This analysis misses the mark.

1. We begin with text, and with this Court's familiar admonition that "[s]tatutory interpretation is a holistic endeavor." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks and citation omitted). Thus, each statutory term should be construed "not in isolation, but 'in its proper context.'" *Porter v. Nussle*, 534 U.S. 516, 527 (2002) (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). Indeed, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

Such is the case here. By its terms, Section 332(c)(7)(B)(iii) requires denials of requests to build or modify a personal wireless service facility to be "in writing *and supported by substantial evidence*." 47 U.S.C. § 332(c)(7)(B)(iii) (emphasis added). Those twin requirements – contained side-by-side in the same sentence – work in tandem. As the Ninth Circuit has explained, "[i]f [judicial review for substantial evidence] is to be undertaken at all, courts must at least be able to ascertain the basis of

the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record." *MetroPCS*, 400 F.3d at 722. Consequently, when a local government reduces a decision to deny a permit application to written form but fails to identify any reasons for that decision, the locality fails to comply with the statute.

This remains so even where, as here, a local government's written denial includes an invitation to review the minutes of the hearing (or any other administrative proceeding) at which the application was discussed and voted upon – and even where various concerns or objections regarding the application can be found in that record. As the First Circuit has explained, "[a] written record can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board." *Todd*, 244 F.3d at 60. Only by requiring the document transmitting the denial to the applicant to include "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," *id.*, can a reviewing court be sure to know – as the district court here needed to know – "the rationale of the Council *as a whole* for denying the application." Pet. App. 28a (emphasis added).

2. The Eleventh Circuit implicitly acknowledged that its crabbed interpretation of Section 332(c)(7)(B)(iii) would thwart the provision's purpose of facilitating judicial review. *See City of Milton*, 728 F.3d at 1284-85. But the court of appeals declared

that it was powerless to give effect to that purpose. "We must . . . take the model that Congress has constructed," the Eleventh Circuit asserted, "perceived defects and all." *Id.* at 1284; Pet. App. 14a.

Though cast as judicial modesty, this reasoning actually subverts Congress' work for no legitimate reason. As this Court has said time and again, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Accordingly, "[i]n determining the meaning of the statute, [courts should] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

The object and policy of Section 332(c)(7)(B) – especially when read against the backdrop of the 1996 Act as a whole – is to prevent local governments from imposing undue "impediments [to] the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes*, 544 U.S. at 115; *see also id.* at 127-28 (Breyer, J., concurring) (emphasizing importance of expedited judicial review remedy as part of the congressional scheme). Issuing a denial of an application with no reasoning whatsoever – and thereby making the required expedited judicial review more costly and burdensome, if not downright impossible – is just one such impediment. Therefore, Section 332(c)(7)(B)(iii)'s requirement that denials be "in writing and supported by substantial evidence" is most naturally read as requiring local governments to provide reasons for their decisions in documents

denying permits. That is the only way to guarantee – consistent with Congress's design – that that federal courts are able to conduct substantial evidence review on an expedited basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed 10/01/2013]

No. 12-12250

D. C. Docket No. 1:10-cv-01464-AT

T-MOBILE SOUTH, LLC,
Plaintiff-Appellee,

versus

CITY OF ROSWELL, GEORGIA,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(October 1, 2013)

Before HULL, WILSON and HILL, Circuit Judges.

HULL, Circuit Judge:

Defendant-Appellant, the City of Roswell, Georgia, appeals the district court's order granting Plaintiff-Appellee T-Mobile South LLC's motion for summary judgment and issuing an injunction on the basis that the City's denial of T-Mobile's requested cell phone tower permit violated the Telecommunications Act of 1996. After review of the briefs and record, with the benefit of oral argument, and in light of our decision in *T-Mobile South, LLC v. City of Milton, Georgia*, --- F.3d ----, 2013 WL 4750549 (11th Cir. Sept. 5, 2013), we reverse and remand for further proceedings.

I. BACKGROUND

A. Roswell City Ordinance Governing Construction of Cell Towers

An ordinance of the City of Roswell, Georgia ("City") establishes guidelines for the location and construction of wireless communication towers ("cell towers") and antennas to "encourage the development of wireless communications while protecting the health, safety, and welfare of the public and maintaining the aesthetic integrity of the community." Roswell City Ordinance § 21.2.1.

A telecommunications company that seeks to construct a new cell tower or antenna must submit an application to the City. *Id.* § 21.2.4(a). An application will be approved or denied based on a consideration of the following factors:

> (1) Proximity to residential structures and residential district boundaries;
>
> (2) The proposed height of the tower;
>
> (3) Nature of uses on adjacent properties;
>
> (4) Surrounding topography, tree coverage and foliage;
>
> (5) Design of the facility, with particular reference to design characteristics which have the effect of reducing or eliminating visual obstructiveness;
>
> (6) Proposed ingress and egress;
>
> (7) Availability of suitable existing towers, other structures, or alternative technologies (microcells) not requiring the use of towers or structures;

(8) Demonstrated need for the telecommunications facility at the specified site;

(9) Utilization of the City of Roswell Master Siting Plan, as amended.

Id.

The ordinance further provides that cell towers may be located only in certain zoning districts; namely, office and business distribution districts (zoned "I-1") and highway commercial districts (zoned "C-3"). *Id.* § 21.2.5(a). Towers placed in any other zoning districts, including residential zoning districts, "shall be alternative tower structures only." *Id.* Alternative tower structures include "man-made trees, clock towers, bell steeples, light poles and similar alternative-design mounting structures, that in the opinion of [the City C]ouncil, are compatible with the natural setting and surrounding structures, and effectively camouflage or conceal the presence of antennas or towers." *Id.* § 21.2.2.

Generally, an application for the construction of a cell tower or antenna must be approved after a public hearing before the City's Mayor and City Council. *Id.* § 21.2.6(b).

B. T-Mobile's Application

On February 2, 2010, T-Mobile South, LLC ("T-Mobile") submitted an application to construct a 108-foot tall cell tower at 1060 Lake Charles Drive in Roswell on 2.8 acres of vacant property zoned single-family residential and located in a well-established residential neighborhood. T-Mobile proposed an "alternative" tower structure in the shape of a man-made tree, or a "monopine." The proposed tower would be about twenty to twenty-five feet taller than

the pine trees surrounding it. T-Mobile claimed that this tower was necessary in this location in response "to the demands of its customers."

On March 24, 2010, due to an "outpouring of public opposition" to the proposed Lake Charles Drive site, T-Mobile renewed an earlier request with the City to lease to T-Mobile public property near a fire station instead, but the City did not grant the request.

In the meantime, the process moved forward on T-Mobile's request to construct on the Lake Charles Drive site. After reviewing T-Mobile's application and receiving a substantial amount of letters, e-mails, and petition signatures opposing the application, the City's Planning and Zoning Division ("Planning Department") issued an April 7, 2010 memorandum to the Mayor and City Council concluding that T-Mobile's application met all ordinance requirements for the construction of a cell tower. But the Planning Department recommended that the Mayor and the City Council approve the application on the conditions that T-Mobile: (1) move the site of the cell tower to a location closer to the west property line on the Lake Charles Drive site, in order to place the tower's largest visual impact on the adjacent homeowner who would lease the site to T-Mobile; (2) construct a black vinyl fence surrounding the tower; and (3) install 33 "evergreen trees around the leas[ed] area to screen the view of the structure and equipment facilities from the residential homes located to the east of the property."[1]

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[1] T-Mobile claims that it agreed to all the conditions except the relocation of the tower, to which the leased property owner would not agree.

C. Public Hearing on T-Mobile's Application

On April 12, 2010, Mayor Jere Wood and the Roswell City Council convened a public hearing to consider T-Mobile's application. One Councilmember, Nancy Diamond, recused herself because she lived in the path of the proposed cell tower. The hearing lasted a little over two hours and comprises 108 pages of transcript. Minutes of the hearing were also recorded.

The Planning Department Director, Brad Townsend, presented the T-Mobile application at the hearing, along with the Planning Department staff's recommendations. While acknowledging that his staff had received "over a thousand-plus e-mails, signatures, petitions, letters in opposition [to] the proposed location," Townsend stated that his staff recommended approval of the application, provided that T-Mobile abided by the three conditions listed in his staff's report. Townsend said that T-Mobile had received the report but had not yet addressed the recommendation of moving the tower.

A representative of applicant T-Mobile, Lannie Greene, stated that he had thirteen years' experience in site acquisition and permitting of cell towers. Greene said that he had reviewed the City's ordinance governing cell tower placement and had chosen a site that met the ordinance requirements as well as T-Mobile's requirements. Greene said that while other sites had been considered for the new cell tower: (1) the City had rejected a proposal to place it on public property; and (2) the other tracts considered were ultimately determined to be unsuitable for the project. Greene emphasized that the new cell tower would meet T-Mobile's coverage needs in the area.

A T-Mobile radio frequency engineer, Marquise Lewis, explained to the Mayor and City Council that T-Mobile had chosen the Lake Charles Drive site based on data indicating that the proposed cell tower would be in the center of the area of need. Lewis also said that due to the topology, terrain, and foliage in the Lake Charles Drive area, the alternative wireless coverage facilities suggested by some residents were not feasible.

At the public hearing, the City Council also took public comments, and thirteen City residents spoke, all in opposition to the T-Mobile proposal. Their concerns varied from worries about the proposed tower's aesthetic compatibility with the surrounding area to fears that the technology involved in the T-Mobile proposal was outdated and unnecessary. Some residents complained that a "balloon test" performed by T-Mobile to illustrate how tall and visible the proposed tower would be did not adequately represent the height and visibility of the tower. Another resident observed that the substantial resident testimony would serve as "substantial evidence . . . that shows it's simply not in the best interest of Roswell to move forward with this cell tower at this time."

In rebuttal, T-Mobile tried to assuage residents' concerns. Greene stated that T-Mobile was willing to place a five-foot buffer along the three adjacent properties in accordance with one of the Planning Department's recommendations. And Greene reiterated that T-Mobile's proposal met all the ordinance's requirements for placing a cell tower in a residential area. Additional rebuttal evidence by T-Mobile included: testimony by an Atlanta real property appraiser and consultant that placement of cell

towers did not negatively influence property value and testimony from a radio frequency engineer Lewis reiterating that alternative technologies would not suffice.

After T-Mobile's rebuttal, members of the City Council commented on the proposal.[2] Councilmember Richard Dippolito asked again about alternative facilities, but Lewis responded that none were appropriate for this project. Councilmember Becky Wynn expressed concerns with the tower's ability to provide continuous emergency power for 911 services, observing the lack of a backup generator in the proposal. Councilmember Jerry Orlans said he was impressed with the information put together by residents and complimented T-Mobile's application as well. Councilmember Kent Igleheart stated that while both sides did a lot of work, "other carriers apparently have sufficient coverage in this area," and no law required the City to "level the field for inferior technology." Councilmember Dippolito agreed with the previous council members' comments and said he found it difficult to conclude that the cell tower would not adversely impact the residential area. Thus, he would not support the application. Councilmember Wynn agreed and said she would also vote against the application.

Finally, Councilmember Dr. Betty Price said that as City Council liaison to the Planning Department, she felt that it was her responsibility to make a motion. Dr. Price stated that based on the City's ordinance, she concluded that the proposed cell phone tower would be aesthetically incompatible with the

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[2] Councilmember Kay Love was present at the hearing but did not comment.

natural setting and surrounding structures, particularly due to the proposed tower's height being greater than the surrounding trees. Specifically, Dr. Price said:

> I think based on our ordinance, Article 21.2.1, . . . the purpose and intent of our cell-phone ordinance is to protect the residential areas from the adverse impact of telecommunications towers and to minimize the number of towers and the other adverse impacts being minimized.
>
> I think the conclusion from that first section would be that this is aesthetically incompatible and certainly in this area. It's other than I-1, C-3 offices or highway commercial area [zoning districts].
>
> Number two, the alternative tower that was proposed, in my opinion, it would not be compatible with the natural setting and surrounding structures also due to the height being created by the other trees.
>
> And, number three, in our Ordinance 21.2.4, the proximity to residential structures, the nearness to other homes, and being within the residential zoning area and adjacent properties, therefore, the adverse effects to the enjoyment of those neighbors and potential loss of resale value among other potential parameters are difficult really to definitively assess.
>
> Therefore, overall, I move to deny the application for the wireless facility monopine tower on Lake Charles Drive.

Council member Wynn seconded the motion, and the motion to deny the application was passed unanimously.

D. City's Letter Denying T-Mobile's Application

On April 14, 2010, Planning Department Director Townsend sent a letter to Greene advising T-Mobile that the Mayor and City Council had denied T-Mobile's request to construct a cell phone tower. The letter in its entirety states:

Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number].

If you have any additional questions, please contact me at [phone number].

E. Procedural History

On May 13, 2010, T-Mobile filed a complaint in district court alleging that the City's denial of its cell tower application was not supported by substantial evidence in the record and would effectively prohibit the provision of wireless service in violation of the Telecommunications Act of 1996 ("TCA"). T-Mobile also sought an injunction compelling the City to grant it the requested permit. Following discovery, the parties filed cross-motions for summary judgment.

On March 27, 2012, the district court granted T-Mobile's summary judgment motion, concluding that the City had violated the TCA, and denied the City's cross-motion. Specifically, the district court held that the City's short denial letter failed to satisfy the "in writing" requirement contained in 47 U.S.C. § 332(c)(7)(B)(iii) of the TCA. The statute requires that a state or local government's decision denying a

request for a permit to erect a cell tower be "in writing and supported by substantial evidence contained in a written record." The district court limited its decision to the "in writing" requirement, stating that the City's violation of the "in writing" requirement rendered it unnecessary for the court to address the "substantial evidence" requirement or T-Mobile's argument that the City's decision would effectively prohibit T-Mobile from providing wireless service.

The district court adopted a reading of the "in writing" requirement employed by several courts around the country. Under that reading, a separate written document delineating the specific reasons for the local government's decision is required to satisfy the "in writing" requirement of the TCA. The district court acknowledged that the record—here, the hearing transcript and minutes—gave some indication of the Council's rationale for denying the application. But then the district court concluded that on the whole, "[t]he written record . . . reflects a number of different reasons that may have motivated individual Council members to vote to deny T-Mobile's application but it is impossible for the Court to discern which of these reasons motivated the Council as a whole or commanded the support of a majority of the Council members."

Thus, "[a]bsent some explanation of the rationale for the City Council's denial of T-Mobile's application," the district court stated that it was "left to review this voluminous record without any guidance as to what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why." Consequently, the district court

concluded that the City's denial did not satisfy the "in writing" requirement of the TCA.

The district court issued a permanent injunction requiring the City to issue T-Mobile the requested permit. The district court stayed the injunction by a consent order dated May 4, 2012, pending the City's appeal.

II. DISCUSSION

A. The TCA's "In Writing" Requirement

The issue in this appeal is whether the City's denial of T-Mobile's request for a permit complied with the "in writing" requirement of the TCA. The relevant statute provides:

> Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

47 U.S.C. § 332(c)(7)(B)(iii) (emphasis added).

The City contends that its denial of T-Mobile's application satisfied the "in writing" requirement in § 332(c)(7)(B)(iii) because the City's decision was reduced in writing in numerous forms, including the denial letter, hearing minutes, and hearing transcript. In response, T-Mobile argues that other circuit courts considering this question have concluded that the TCA requires both a written decision and a written record. Moreover, several courts have demanded that the written decision set forth the reasons for the denial. Thus, T-Mobile contends that the district court adopted the correct test for determining whether a local government's denial

satisfies the "in writing" requirement, and the City's brief, three-sentence letter notifying T-Mobile of the denial of its permit application did not suffice under that test.[3]

B. This Court's Intervening Decision in *T-Mobile South, LLC v. City of Milton*.

At the time of the district court's order in this case, this Court had not addressed the meaning of the "in writing" requirement of § 332(c)(7)(B)(iii). But while this appeal was pending, this Court decided a substantially similar case in *T-Mobile South, LLC v. City of Milton, Georgia*, — F.3d —, 2013 WL 4750549 (11th Cir. Sept. 5, 2013). That case presented the very question raised here: did a city council comply with the "in writing" requirement set forth in § 332(c)(7)(B)(iii). *City of Milton*, 2013 WL 4750549, at *2.[4]

In deciding this question in *City of Milton*, our Court adopted a plain reading of the statute. We held that "[t]he words of the statute we are interpreting require that the decision on a cell tower construction permit application be 'in writing.'" *Id.* at *11. This Court reasoned that the statute does not say that

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[3] In ruling that separate writing setting forth the reasons for the denial was required, the district court relied, for example, on the First Circuit's decision in *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001), and on the Sixth Circuit's opinion in *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002). Both courts required that the written decision be separate from the record, describe the reasons for the denial, and contain a sufficient explanation to allow a court to evaluate it against the evidence in the record. *See New Par*, 301 F.3d at 395-96; *Todd*, 244 F.3d at 60.

[4] Upon the Court's request, the parties submitted supplemental briefs to address the impact of this Court's decision in *City of Milton*.

"the decision [must] be 'in a separate writing' or in a 'writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held' or 'in a single writing that itself contains all of the grounds and explanations for the decision.'" *Id.* Therefore, we concluded that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." *Id.* We added that "[a]ll of the written documents should be considered collectively in deciding if the decision, whatever it must include, is in writing." *Id.*

This Court then concluded that the City of Milton had satisfied the "in writing" requirement because the written documents available to T-Mobile included: (1) transcripts of hearings in front of the planning commission and in front of the city council, which recounted the motions that were made and the reasons that were given for denying the applications; (2) the denial letters the City of Milton sent to T-Mobile regarding the two applications it denied;[5] and (3) "detailed minutes of the city council hearings, recounting all of the reasons for the action on each application along with the relevant discussion." *Id.* We noted that "T–Mobile had access to all of those documents before its deadline for filing the lawsuit." *Id.* We held that "collectively [these documents] are enough to satisfy the writing requirement of § 332(c)(7)(B)(iii)." *Id.* However, we added that under

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[5] T-Mobile made three different permit applications in *City of Milton*. 2013 WL 4750549, at *3. The City of Milton denied two applications and conditionally approved the third. *Id.* at *5. The appeal in this case involves only the denial of one application for a permit.

the facts in *City of Milton*, "we need not consider whether something less than or different from all of those documents would be enough." *Id.*

In reaching its decision in *City of Milton*, this Court rejected the "pragmatic" reading of the "in writing" requirement employed by the district court in the instant case and by several of our sister circuits. *Id.* at *10. Those courts have required that a written denial must be "separate from the written record" and "must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *see also New Par v. City of Saginaw*, 301 F.3d 390, 395–96 (6th Cir. 2002) (requiring that the written decision be separate from the record, describe the reasons for the denial, and contain a sufficient explanation to allow a court to evaluate it against the evidence in the record); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 721–23 (9th Cir. 2005) (requiring a written denial separate from the written record with sufficient explanation to allow for judicial review).

Our Court, however, concluded that this expansive reading goes beyond "the judicial function." *City of Milton*, 2013 WL 4750549, at *10. Thus, in interpreting the words "in writing," we refused to "take a more 'pragmatic, policy-based approach' than the plain meaning of those words take." *Id.* (citations omitted).

C. Analysis of this Case in Light of our Decision in *City of Milton*.

Given our interpretation of § 332(c)(7)(B)(iii) in *City of Milton*, all that is left to do here is to analyze the facts of this case under the framework set forth in

City of Milton. There are few, if any, distinctions between the two cases.

As in *City of Milton*, the City of Roswell provided T-Mobile with a written letter clearly stating that the City Council had denied T-Mobile's request to build the proposed cell tower during the April 12, 2010 hearing. That same letter informed T-Mobile that "[t]he minutes from the aforementioned hearing may be obtained from the city clerk" and even provided T-Mobile with a contact to assist T-Mobile in obtaining the minutes. T-Mobile therefore had access to the written minutes of the City Council hearing where its request was denied.

Like in *City of Milton*, the hearing minutes "recount[] all of the reasons for the action on [the] application along with the relevant discussion." 2013 WL 4750549, at *11. We note, however, that there were sixty-five pages of minutes in *City of Milton, see id.* at *7, compared to only ten pages of minutes in this case. But our analysis in *City of Milton* did not turn on the number of pages; instead, we focused on whether the reasons for the decision could be found in the minutes. *Id.* at *11. The minutes in this case summarize the testimony of experts and concerned citizens, along with comments and questions from councilmembers. The minutes also reflect the reasons given by Councilmember Dr. Betty Price in support of her motion to deny T-Mobile's request. They further indicate that two additional councilmembers seconded Dr. Price's motion and that the motion "passed unanimously."[6]

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[6] We note that the transcript of the hearing indicates that only one councilmember seconded the motion. The minutes, however, state that two councilmembers seconded Dr. Price's motion. This conflict matters not for our disposition here.

T-Mobile received, or at least could have received, an even more detailed written account of the City Council's decision in the 108-page transcript of the April 12, 2010 hearing. While it is unclear whether T-Mobile hired the court reporter to transcribe the hearing (as it did in *City of Milton*, *see* 2013 WL 4750549, at *3), the record does indicate that the transcript was finalized and available on April 19, 2010, well before the 30-day time period for filing this lawsuit expired. *See* 47 U.S.C. § 332(c)(7)(B)(v) (stating that "[a]ny person adversely affected by any final action or failure to act by a . . . local government . . . that is inconsistent with [the TCA's "in writing" requirement] may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.") T-Mobile does not contend that it was unable to obtain a copy of the transcript before filing the instant lawsuit.

In sum, T-Mobile in this case had the same "writings" it had in *City of Milton*: (1) a letter explicitly denying T-Mobile's request; (2) minutes summarizing the April 12, 2010 hearing and recounting the reasons for the denial; and (3) a verbatim transcript of the April 12, 2010 hearing during which the City Council denied the request. Under our analysis in *City of Milton*, we must conclude here that "collectively [these documents] are enough to satisfy the writing requirement of § 332(c)(7)(B)(iii)." 2013 WL 4750549, at *11.[7]

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[7] To be clear, the sole issue before us in this case is whether the City complied with the "in writing" requirement of § 332 (c)(7)(B)(iii). The district court limited its decision to that question; it did not proceed to analyze, for example, whether the City's denial is "supported by substantial evidence contained in a written record." § 332(c)(7)(B)(iii). Nor have the parties

Lastly, we reject T-Mobile's attempt to distinguish this case from our opinion in *City of Milton*. First, T-Mobile contends that "[f]undamental to the outcome in *[City of] Milton* was the clearly pre-written motion that was read into the record and reproduced in the minutes for each application." T-Mobile refers us to page four of our opinion in *City of Milton*, but we cannot find any indication there that the motions in *City of Milton* were indeed "pre-written" before the hearing. *See* 2013 WL 4750549, at *4. Nor do we believe that this supposed distinction would make a difference. The critical facts underlying our decision in *City of Milton* are that T-Mobile received a written denial and that the reasons for the denial could be gleaned from the written transcript and the written minutes of the hearing. *Id.* at *8. Our holding in *City of Milton* did not depend on whether the councilmember moving to deny the permit read from prepared notes or stated her reasons without the aid of a "pre-written document." Instead, what mattered in *City of Milton* was that the stated reasons were captured in a written document, such as the transcript or the minutes of the hearing.

Second, T-Mobile suggests that the reasons offered by Councilmember Dr. Price in support of her motion to deny the request were "[u]nlike the pre-written motions read into the record" in *City of Milton* because "Councilmember Price's statement reflects her impromptu opinion." This Court's opinion in *City of Milton* quoted the reasons stated in support of the councilmember's motion in that case, *see* 2013 WL 4750549, at *4, as we did earlier in this opinion. After

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addressed this issue. We therefore express no opinion as to whether the "substantial evidence" requirement is met in this case nor about any other issue in this case that is not before us.

comparing the reasons stated in support of the respective motions, we reject the contention that the manner in which Dr. Price stated her reasons in this case is materially different from her counterpart's statements in *City of Milton*. While the reasons offered in support of the respective motions may have been different, our analysis of the "in writing" requirement in *City of Milton* relied neither on the merits of the stated reasons nor on the eloquence of the councilmember.

III. CONCLUSION

For the reasons set forth above, we reverse the district court's grant of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed 03/27/12]

CIVIL ACTION NO.
1:10-CV-1464-AT

T-MOBILE SOUTH, LLC,
Plaintiff,

v.

CITY OF ROSWELL, GEORGIA,
Defendant.

ORDER

This action is before the Court on cross-motions for summary judgment [104, 106]. For the following reasons, the Court grants plaintiff's motion and denies defendant's motion.

Background[1]

Plaintiff T-Mobile South, LLC ("T-Mobile"), provides wireless telecommunication services pursuant to licenses granted by the Federal Communications Commission ("FCC"). In October 2008, T-Mobile approached defendant City of Roswell, Georgia (the "City"), seeking a lease to locate a wireless facility at Roswell Fire Station No. 3. T-Mobile had determined

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[1] Unless otherwise noted, the following facts are not in dispute.

that it needed an additional facility to improve its service coverage in the area and selected the fire station site because it was identified on the City's Master Wireless Facilities Siting Plan as a preferred location for wireless facilities. Nevertheless, following a specially-called neighborhood meeting at which local residents objected to the fire station site, the City declined to enter into a lease with T-Mobile and removed Fire Station No. 3 from its Master Wireless Facilities Siting Plan.

T-Mobile continued to search for a suitable site in the area to locate an additional wireless facility. On February 2, 2010, T-Mobile filed an application with the City seeking permission to construct a 108-foot tall "monopine" telecommunications tower[2] on a 2.8 acre parcel of vacant land adjacent to 1060 Lake Charles Drive. Record ("R.") 120-76.[3] The proposed tower site is located less than a mile from Fire Station No. 3 in a well-established residential neighborhood that includes a lake and consists predominantly of single-family homes.

On March 24, 2010, due to an "outpouring of public opposition" to the proposed Lake Charles Drive site, T-Mobile wrote to the City asking that it reconsider leasing property at Fire Station No. 3 for T-Mobile to construct a wireless facility. R. 325. The City never responded to the letter.

On April 7, 2010, after reviewing the application and receiving more than 900 letters, emails, or petition signatures in opposition to the proposed cell

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[2] A monopine tower is designed to resemble a large pine tree.

[3] Record citations are to the City's Original Certified Record of T-Mobile's Application for Cell Tower filed with the Court on April 26-27, 2011.

tower location, the Planning and Zoning Division of the City's Community Development Department issued a memo to the Mayor and City Council finding that T-Mobile's application "meets all Code Requirements set forth in City Code Article 21.2, Standards for Wireless Communications Facilities."[4] R. 59. The memo recommended that the City Council determine that the "structure is compatible with the natural setting and surrounding structures as required by Article 21 of the Roswell City Code." R. 61. The memo further recommended that the Council approve the application with the conditions that T-Mobile (1) move the site of the cell tower to a location nearer the west property line in order to place the largest visual impact on the adjacent homeowner who was leasing the site; (2) construct a black vinyl fence with black screening so the facility equipment could not be seen through the fence; and (3) install 33 evergreen trees around the lease area to screen the view of the structure and equipment facilities from the residential homes located to the east of the property.[5] *Id.*

On April 12, 2010, the Mayor and Council held a hearing to consider the application. Planning and Zoning Director Brad Townsend presented the staff's

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[4] Article 21.2 requires that wireless facilities located in residential areas be "alternative tower structures only," which are defined as "man-made trees, clock towers, bell steeples, light poles and similar alternative-design mounting structures, that in the opinion of council, are compatible with the natural setting and surrounding structures, and effectively camouflage or conceal the presence of antennas or towers." Sections 21.2.2 & 21.2.5(a) (R. 102, 106).

[5] All of the conditions were acceptable to T-Mobile except the relocation of the tower, to which the property owner would not agree. Verified Compl. ¶ 47.

recommendations. Transcript ("T.") 4-8.[6] After hearing from representatives of T-Mobile as well as a number of local residents opposed to the location of the cell tower, the Council voted unanimously to deny T-Mobile's application. T. 107-08; R. 558. On April 14, 2010, Mr. Townsend sent T-Mobile a letter advising it that the application had been denied. R. 560. The letter stated that T-Mobile could obtain a copy of the minutes of the hearing from the city clerk, but it provided no reasons for the denial.

On May 13, 2010, T-Mobile filed this action alleging that the City's denial of its application was not supported by substantial evidence and would have the effect of prohibiting the provision of personal wireless services in violation of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B).[7] T-Mobile seeks an injunction compelling the City to grant it the requested permit. Following discovery, both parties moved for summary judgment.

Summary Judgment Standard

Under Rule 56© [sic] of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." In *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the Supreme Court held that this burden could be met if the moving party demonstrates "that there is an absence of evidence to support the non-moving party's case." At that point

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[6] A copy of the transcript of the hearing is attached to T-Mobile's Motion for Summary Judgment as Exhibit E [106-17].

[7] T-Mobile also alleged that the denial had the effect of unreasonably discriminating among providers of functionally equivalent services, but it has dismissed that claim.

the burden shifts to the non-moving party to go beyond the pleadings and present specific evidence giving rise to a triable issue. In reviewing a motion for summary judgment, the Court must construe all factual inferences in the light most favorable to the non-moving party. *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1422 (11th Cir. 1989). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original).

The Rule 56 standard is not affected by the filing of cross-motions for summary judgment: "The court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE and PROCEDURE § 2720 at 335-36 (3d ed. 1998). Cross-motions may, however, be probative of the absence of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. *See United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984).

Discussion

The Telecommunications Act of 1996 ("TCA") preserves local zoning authority over the placement of cell towers, but it imposes important limitations on that authority. A local government's decision denying a request to construct a cell tower must "be in writing and supported by substantial evidence contained in a

written record."[8] 47 U.S.C. § 332(c)(7)(B)(iii). In addition, local government regulation of cell tower placement must "not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

T-Mobile claims that the City of Roswell violated each of these requirements when it denied T-Mobile's application to construct a cell tower adjacent to 1060 Lake Charles Drive. T-Mobile argues that it is entitled to summary judgment because the undisputed evidence establishes that (1) the City failed to issue a written decision stating the reasons for its denial of the application;[9] (2) the denial is not supported by substantial evidence in the written record; and (3) the denial will effectively prohibit it from providing

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[8] "Substantial evidence" as used in the TCA means "the traditional standard used for judicial review of agency actions." *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1218 (11th Cir. 2002) (citations and internal quotation marks omitted).

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Although . . . not as stringent as the preponderance of the evidence standard, it requires courts to take a harder look than when reviewing under the arbitrary and capricious standard. Finally, to determine whether the substantial evidence standard is met, a court should view the record in its entirety, including evidence unfavorable to the state or local government's decision.

Id. (citations and internal quotation marks omitted)

[9] The City points out that T-Mobile did not expressly assert such a claim in its complaint, although the complaint does allege that the City's denial letter "gives no reasons for the denial." Compl ¶ 75. The City, however, does not object to the Court's consideration of the claim, and the Court deems any such objection to have been waived.

personal wireless services in the area to be served by the proposed cell tower.

The City, on the other hand, contends that (1) its letter of denial referencing the minutes of the City Council hearing on T-Mobile's application satisfies the requirement of a written decision; (2) the written record of the hearing contains substantial evidence supporting the denial of the application; and (3) the denial will not have the effect of prohibiting T-Mobile from providing personal wireless services in the affected area. Therefore, the City argues that it, rather than T-Mobile, is entitled to summary judgment.

The material facts are not in dispute. The only issue is whether the City's denial of T-Mobile's application complied with the relevant requirements of the TCA. If so, then the City is entitled to summary judgment. If not, then T-Mobile is entitled to summary judgment. For the following reasons, the Court concludes that the City violated the TCA by failing to issue a written decision stating the reasons for its denial of T-Mobile's application. This violation alone entitles T-Mobile to summary judgment and issuance of appropriate injunctive relief. Therefore, the Court need not consider the parties' arguments regarding whether the denial is supported by substantial evidence or would effectively prohibit T-Mobile from providing wireless services in the area.

I. Failure to Satisfy "In Writing" Requirement

After the City Council voted to deny its application, Planning and Zoning Director Brad Townsend sent T-Mobile a letter of denial, which stated in its entirety as follows:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile

> for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at 770-641-3727.
>
> If you have any additional questions, please contact me at 770-594-6176.

R. 560.

T-Mobile contends that this letter is insufficient as a matter of law to satisfy the TCA's "in writing" requirement because it fails to explain the reasons for the denial. This failure alone, T-Mobile argues, constitutes adequate grounds to grant it summary judgment and reverse the City's decision. In response, the City argues that the letter together with the referenced minutes, as well as the transcript of the hearing, adequately set out the reasons for its denial of T-Mobile's application and thus satisfy the "in writing" requirement.

The TCA does not define what is required for a decision to be "in writing," and the Eleventh Circuit has not addressed this question. *See Preferred Sites*, 296 F.3d at 1218 n.8. Of those circuits that have addressed the question, however, all but one have held that a written denial must be "separate from the written record" and "must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001) (citation omitted). *Accord Helcher v. Dearborn Cnty.*, 595 F.3d 710, 719 (7th Cir. 2010); *MetroPCS, Inc. v. City and Cnty. of San Francisco*, 400 F.3d 715, 723 (9th Cir. 2005); *New Par v. City of Saginaw*, 301 F.3d 390, 395-96

(6th Cir. 2002). Only the Fourth Circuit has reached a contrary conclusion. *See AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998) (holding written minutes of meeting and stamping word "DENIED" on letter describing application sufficient).

Other judges in this district have rejected the Fourth Circuit's minimal standard and followed the majority rule. *See T-Mobile South, LLC v. City of Milton*, No. 1:10-CV-1638-RWS, 2011 WL 2532920, at *2 (N.D. Ga. June 24, 2011) (Story, J.); *T-Mobile South, LLC v. Gwinnett Cnty.*, No. 1:07-CV-1454-JEC, slip op. at 7-11 (Mar. 23, 2010) (Carnes, J.) (unpublished); *T-Mobile South, LLC v. Coweta Cnty.*, No. 3:07-CV-059-JTC, slip op. at 14 (N.D. Ga. Sept. 30, 2008) (Camp, J.) (unpublished); *Powertel/Atlanta, Inc. v. Fulton Cnty.*, No. 1:02-CV-1199-GET, slip op. at 10-11 (N.D. Ga. June 2, 2003) (Tidwell, J.) (unpublished). As noted by Judge Carnes, the Eleventh Circuit has suggested that a failure to state reasons at the time of the denial violates the "in writing" requirement. *See Preferred Sites*, 296 F.3d at 1220 n.9 (local government "may not rely on rationalizations constructed after the fact to support the denial of [an] application").

This Court finds the reasoning of the majority of the other circuits and the other judges of this district persuasive. The "in writing" requirement demands something more than a bare written statement of denial, because the judicial review contemplated by the TCA is frustrated if a reviewing court has no means to ascertain the rationale behind the decision. *See MetroPCS*, 400 F.3d at 722; *Todd*, 244 F.3d at 60. To satisfy the "in writing" requirement, a written denial "must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain

a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." *New Par*, 301 F.3d at 395-96.

The City argues that its letter of denial satisfies the "in writing" requirement because it refers to the minutes of the hearing and there is also a transcript of the hearing that contain the reasons for the denial. As the First Circuit pointed out in *Todd*, however, "permitting local boards to issue written denials that give no reasons for a decision would frustrate meaningful judicial review, *even where the written record may offer some guidance as to the board's rationale*." 244 F.3d at 60 (emphasis added). "A written record can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board." *Id.* (citation omitted).

That is precisely the case here. The minutes and transcript of the hearing reflect questions and comments by individual Council members, but nowhere is there a clear articulation of the rationale of the Council as a whole for denying the application. Of the six Council members who voted, one (Kay Love) did not speak at all during the hearing. Another (Jerry Orlans) briefly questioned T-Mobile's radio frequency engineer about an alternative technology known as DAS (distributed antenna system) and whether it was the same as a microcell system (T. 20), but in his comments prior to the vote he gave no reasons for opposing T-Mobile's application. T. 100-01. A third Council member (Rich Dippolito) questioned the City's Planning and Zoning Director about the height

of the proposed tower and the surrounding trees (T. 8-9), and he also questioned T-Mobile's radio frequency engineer about the viability of DAS as an alternative technology (T. 20-21, 96-97), but in his comments prior to the vote he cited only the tower's "[in]compatibility with the natural setting" as a reason for opposing T-Mobile's application. T. 105. Similarly, a fourth Council member (Becky Wynn) questioned T-Mobile's representative about how T-Mobile would provide continuous service without a back-up generator on the site (T. 98-100), but in her comments prior to the vote she said only that she opposed the tower because it was not "compatible with this area." T. 105-06. A fifth Council member (Kent Igleheart) did not ask any questions, but in his comments prior to the vote he expressed concern that "other carriers apparently have sufficient coverage in this area," and stated that "[i]t's not our mandate to level the field for inferior technology." T. 102. Mr. Igleheart also stated his view that cell towers should never be allowed in residential areas. T. 103. Finally, in moving to deny the application, Council member Dr. Betty Price provided the most detailed statement of reasons for opposing the tower, citing both its aesthetic incompatibility with the neighborhood and its adverse impact on property values.[10] T. 107-08.

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[10] Dr. Price's statement was as follows:

> I think based on our ordinance, Article 21.2.1, which was shown on the screen earlier, the purpose and intent of our cell-phone ordinance is to protect the residential areas from the adverse impact of telecommunication towers and the other adverse impacts being minimized.
>
> I think the conclusion from that first section would be that this is aesthetically incompatible and certainly in this area. It's other than I-1, C-3 offices or highway commercial area.

The written record thus reflects a number of different reasons that may have motivated individual Council members to vote to deny T-Mobile's application, but it is impossible for the Court to discern which of these reasons motivated the Council as a whole or commanded the support of a majority of the Council members. In fact, although the City argues that the denial is supported by substantial evidence of the tower's aesthetic incompatibility with the neighborhood and its adverse impact on property values, as well as by T-Mobile's failure to demonstrate a need for the tower, none of these reasons was cited by a majority of the council members as a basis for their vote to deny the application. Three of the six council members (Dippolito, Wynn, Price) cited the tower's incompatibility with the neighborhood. Only one (Price) cited the tower's adverse impact on property values. And not a single council member mentioned a failure to demonstrate a need for the tower as a basis for denying T-Mobile's application.

An explanation of the basis for a denial is particularly important in a case like this one, where

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> Number two, the alternative tower that was proposed, in my opinion, it would not be compatible with the natural setting and surrounding structures also due to the height being created by the other trees.
>
> And, number three, in our Ordinance 21.2.4, the proximity to residential structures, the nearness to other homes, and being within the residential zoning area and adjacent properties, therefore, the adverse effects to the enjoyment of those neighbors and potential loss of resale value among other potential parameters are difficult really to definitively assess.
>
> Therefore, overall, I move to deny the application for the wireless facility monopine tower on Lake Charles Drive.

T. 106-08.

the applicant and opponents presented a substantial volume of conflicting evidence on a number of different issues, including the aesthetics of the proposed tower, its impact on property values, and whether it is needed for the applicant to provide reliable service. For example, T-Mobile submitted photographs of a balloon simulation purportedly showing that the tower would be virtually invisible from surrounding properties. R. 180-210A. Opponents, on the other hand, presented a video and other photographs purportedly showing that the wind had kept the test balloon below full height and that the tower would be far more visible than T-Mobile's photographs indicated. T. 27-29, 56; R. 356-60. T-Mobile also submitted several studies of the impact of telecommunications towers on residential property values purportedly showing that they had no detrimental effect, although none of the studies were for the impacted neighborhood in question. R. 212-320. Opponents, on the other hand, presented the general opinions of local real estate professionals, one of whom stated that a cell tower would reduce residential property values anywhere from 5% - 35%. R. 374; T. 62. T-Mobile also submitted computer-generated coverage maps and the testimony of a radio frequency engineer to show that it lacked reliable in-vehicle and in-building coverage in the area. R. 150-56; T. 16-17. But opponents presented the testimony of a T-Mobile subscriber who said she had good coverage in the area, and they also pointed out that on its own website T-Mobile had rated its coverage in the area as "moderate" to "good." T. 52-53; R. 328, 344-45. T-Mobile in turn pointed out that its coverage definitions for these descriptors indicated that coverage in a vehicle or home might be inconsistent and unreliable. R. 328.

Absent some explanation of the rationale for the City Council's denial of T-Mobile's application, the Court is left to review this voluminous record without any guidance as to what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why. Furthermore, insofar as the Council relied on evidence regarding the proposed tower's adverse effect on aesthetics and property values, it is impossible to determine whether it found that this particular tower would have an adverse effect in this particular neighborhood, or instead, that any cell tower would have such an effect in any residential area, so that cell towers in general should not be permitted in residential areas. Some of the evidence presented by opponents supports only the latter finding. T. 31-32, 42-43, 55, 57, 81 (testimony by residents that cell towers should not be permitted in residential areas); T. 62-64. The City's prior rejection of the fire station site suggests a reluctance to permit cell towers in any residential neighborhood. A rejection based alone on a "blanket aesthetics objection" – independent of any specific evidence relating to the cell tower's impact on the specific neighborhood and property values – would be insufficient to justify denial of a permit. *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 761 (11th Cir. 2005). *See also Preferred Sites*, 296 F.3d at 1219; *Am. Tower, LP v. City of Huntsville*, 295 F.3d 1203, 1208 & n.7 (11th Cir. 2002). On the other hand, council members may have properly considered the visual intrusiveness and property values impact of the tower on this specific neighborhood.

A recent case from this district on which the City relies heavily is instructive on this point. In *T-Mobile South, LLC v. Cobb Cnty.*, No. 1:10-CV-0111-WSD, 2011 WL 336641 (N.D. Ga. Jan. 31, 2011), Judge

Duffey upheld the Cobb County Board of Commissioners' denial of T-Mobile's application for a permit to build a monopine tower on property owned and occupied by a local church. The evidence presented by T-Mobile and tower opponents in that case was similar to the evidence presented in this case. 2011 WL 336641, at *2-*3. The grounds for the Board's denial of T-Mobile's application were the same as those asserted by the City in this case: aesthetic incompatibility with the neighborhood, adverse effect on property values, and failure to demonstrate a need for the tower. *Id.* at *3-*4. However, in sharp contrast to the perfunctory denial letter issued in this case, which provided no reasons for the denial, the Cobb County Board of Commissioners issued a written decision clearly setting out its rationale for denying T-Mobile's application. *Id.* Guided by the Board's clearly articulated rationale for its decision, Judge Duffey was able to assess whether there was substantial evidence to support that rationale. *Id.* at *6-*9. In this case, on the other hand, the Court is unable to make that assessment because it is unable to determine the City Council's rationale for its decision.

The only Eleventh Circuit authority cited by the City for its contention that a denial letter, coupled with the minutes and transcript of a hearing, satisfies the TCA's "in writing" requirement is the decision in *Am. Tower, LP v. City of Huntsville*. In that case, however, the plaintiffs conceded that the "in writing" requirement was satisfied. *Am. Tower*, 295 F.3d at 1206 n.2. Since the parties did not raise the issue, the court did not address it. Instead, it merely noted that the zoning board had sent the applicant a letter denying its application, and that the reasons for the denial appeared in the minutes

and transcript of the hearing. *Id.* at 1207 n.3. This passing observation, made in the absence of any issue raised by the parties or any analysis by the court, is not sufficient to persuade this Court that the Eleventh Circuit would not follow the well-reasoned decisions of the majority of its sister circuits that have actually addressed this issue.

Accordingly, the Court concludes that the City violated the TCA by failing to issue a written denial separate from the written record describing the reasons for the denial and containing a sufficient explanation of those reasons to permit this Court to evaluate the evidence in the record that supports those reasons.[11] This failure alone is sufficient to entitle T-Mobile to summary judgment and the entry of an appropriate injunction. *See T-Mobile South, LLC v. City of Milton*, No. 1:10-CV-1638-RWS, 2011 WL 2532920, at *3 (N.D. Ga. Jun. 24, 2011) (granting partial summary judgment due to city's failure to satisfy writing requirement and remanding for city to adequately state grounds for denial); 2011 WL 6817820, at *2 (N.D. Ga. Dec. 28, 2011) (granting motion for reconsideration of remand order and finding that violation of writing requirement "warrants an injunction").

II. Appropriate Remedy

The TCA does not specify a remedy for violations. However, the Eleventh Circuit has held that "an

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[11] As the First Circuit held in *Todd*, where such a decision is provided, the Court's review is still based on the entire record, but with the benefit of the local Board's rationale for its decision. "Otherwise, the requirement for a written decision would place an unjustified premium on the ability of a lay board to write a decision." 244 F.3d at 60.

injunction ordering issuance of a permit is an appropriate remedy for a violation of [the TCA]." *Preferred Sites*, 296 F.3d at 1222. The Court concludes that T-Mobile is entitled to an injunction requiring the City to issue the requested permit.

Summary

For the foregoing reasons, the Court DENIES defendant's motion for summary judgment [104] and GRANTS plaintiff's motion for summary judgment [106]. The City of Roswell is ORDERED to grant T-Mobile's application for a permit to construct a 108-foot tall monopine telecommunications tower on the 2.8 acre parcel of land adjacent to 1060 Lake Charles Drive.

IT IS SO ORDERED, this 27th day of March, 2012.

Amy Totenberg
Amy Totenberg
United States District Judge

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 13-975

Supreme Court, U.S.
FILED
MAR 19 2014
OFFICE OF THE CLERK

In The

Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner alleges that the City of Roswell violated the "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii) of the federal Telecommunications Act of 1996 and requests statutory construction of straightforward language that a decision to deny a request for a cellular tower "shall be in writing."

The question presented is whether Petitioner has set forth compelling reasons to grant the Petition, when: (1) the requested statutory construction does not raise an important federal question in need of resolution by this Court because it is neither integral to nor harms Petitioner with respect to its rights and protection under the substantive provisions of the Act, and (2) any split in the Circuits on this construction is so narrow and insignificant in scope that it is already being harmonized in more recent decisions, including the Eleventh Circuit's Opinion at issue.

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INTRODUCTION

Petitioner has failed to carry its burden to demonstrate that there are any "compelling reasons" for this Court to grant this Petition for a Writ of *Certiorari* as required by Sup. Ct. R. 10. First and foremost, Petitioner cannot show that the interpretation of the "in writing" requirement of Section 332(c)(7)(B)(iii) of the Telecommunications Act of 1996 (herein the "Act") presents an important federal question that in any way harms Petitioner and thus needs to be decided by this Court. Second, Petitioner's attempt to show a decisive and "intractable" split in the Circuits on the interpretation of this procedural requirement is flawed. Even a cursory review of the more recent decisions and the relevant Eleventh Circuit Opinion appealed underscore the reality that the Circuit Courts are now reaching a consensus in theory or practice such that this issue does not necessitate or merit review. Finally, Petitioner has not and cannot show that the Eleventh Circuit erred in its interpretation of the straightforward language of the Act, thereby failing to set forth any underlying error and basis for granting of the Petition. The Petition should therefore be denied.

Interpretation of the four words "shall be in writing" is not an important federal question regardless of the fact that these words appear in a federal statute and involve the telecommunications industry. This intended procedural requirement does not affect the substantive rights and protection provided by the Act to telecommunication carriers. Regardless of "the writing," carriers whose petitions are denied at

the local level are still entitled to substantive review of the merits of any decision and enforcement of the protections provided to them by Congress. Indeed, the telecommunications industry has nothing to lose in this alleged conflict, but it undoubtedly has everything to gain. If the Court granted the Petition and decided that the Eleventh Circuit was wrong as to the interpretation of these four words, it is the local governments who would be harmed, as they would be forced to allow cellular towers in the heart of their residential communities based upon a mere technicality, without regard for the merits of their decisions. Seeking to obtain this advantage for itself and the industry, Petitioner brings these four simple words to this Court and asks for an interpretation that is clearly not mandated by the language.

To achieve this benefit through statutory interpretation, Petitioner asserts that there is an "intractable" split in the Circuit Courts as to what constitutes a denial "in writing." A review of the limited Circuit Court decisions on this truly non-issue reveals that Petitioner actually relies upon a conflict that arose more than ten years ago. In 1999, the Fourth Circuit, desiring to protect the quintessential zoning rights of local government specifically set forth by Congress in the Act, took a very conservative approach to the "in writing" requirement allowing a mere stamp on an Application to meet the definition of a "writing." The First and Ninth Circuits quickly responded by requiring that a decision to deny actually be "in writing," i.e., more than a stamp. In doing so, these two Circuits went further and

added a judicial interpretation that clearly exceeded the statutory language of the Act, supplementing the language to include that "the writing" must be a separate letter and contain the explicit reasons for the denial. As the courts have continued to deal with and iron out this procedural issue over the last ten years, any disagreement has become extremely narrow in scope and creates no need for intervention from the highest Court.

All of the Circuits now concur (or by virtue of the facts underlying their decisions their application includes) that to meet the "in writing" requirement of 332(c)(7)(B)(iii) there should be a separate writing (a letter) that sets forth the decision of the local authority to deny the carrier's Application. All of the Circuits agree that "reasons" for a denial are necessary for a reviewing court's evaluation of the merits of the separate and distinct substantive limitation that the decision be "supported by substantial evidence in a written record." The only current discrepancy in the decisions concerns where one may *look* for the reasons for denial of an Application for cellular activity. The real majority, now 5 to 2, maintains that the reasons can be contained in the Minutes or transcripts of the local proceedings, with indications from *dicta* in several of the remaining circuits that they will join this majority approach. The two remaining minority opinions are the ten-year-old First and Ninth Circuit decisions that still require the specific reasons be set out in the denial letter.

Initially, the Sixth Circuit followed this approach. *See New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir.

2002). In fact, the District Court below relied upon *New Par* and adopted its holdings to support the grant of summary judgment to Petitioner. However, two years later in *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 604-607 (6th Cir. 2004), the Sixth Circuit overturned its decision in *New Par* and found that the reasons for the denial could be found in the Minutes of the meeting contained in the record and did not have to be in a separate denial letter. It is reasonable to assume that these two much older decisions will likewise eventually conform to the new majority.

The Eleventh Circuit's Opinion in *T-Mobile South, LLC v. The City of Roswell*, 731 F.3d 1213 (11th Cir. 2013), relies upon the reasoning and detailed analysis of the "in writing" requirement in its decision two months prior in *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013). This decision follows this current majority that allows the reasons to be found in the Minutes, transcripts or record of the proceedings at the local level. In the *City of Milton*, the Eleventh Circuit refused to add requirements through judicial interpretation to the simple Congressional language that a decision to deny "shall be in writing." Thus, a separate letter stating that the Application was denied was deemed sufficient to meet the "in writing" requirement. The reasoning was followed and applied in the decision at bar. This statutory construction is correct and provides no reason for review.

It is worth considering why, almost two decades after the passage of the Telecommunications Act, Petitioner and the telecommunications industry now seek

statutory construction of a procedural technicality that was only truly an issue among a few Circuits ten years ago. It would seem that cellular providers may have exhausted commercial and industrial locations to set up their infrastructure and now desire to gain any advantage possible to allow further expansion by placing cellular towers in the middle of our residential communities, such as the instant Application for an eleven story tower in the heart of an established lakeside neighborhood. As Congress rightly envisioned, local authorities now more than ever must control siting and have the ability to protect their unique environs on a case-by-case basis, subject to the very limited substantive restrictions of the Act. Petitioner should not be able to get around this important Congressional intent by creating a procedural loophole through the "in writing" requirement. Petitioner has not shown a "compelling reason" for granting the Petition, and any motives for the Petition are suspect at best. The Petition should rightfully be denied.

STATEMENT OF THE CASE

In responding to and correcting Petitioners' Statement of the Case, Respondent addresses each numbered argument *seriatim*:

1. Strangely, Petitioner begins its Statement of the Case by seeming to argue that telecommunications are sacrosanct. It certainly more than alludes to the fact that because the United States is falling behind technology in other countries this Court

should be proactive in granting this Petition and protecting the rights of the industry and citizens reliant upon telecommunications. Ignoring the Congressionally mandated limited intrusion into local governmental entities' freedom to locate telecommunication activities, Petitioner argues that it is local government interference that is holding back progress.

While Respondent readily agrees that the United States is indeed becoming a more technologically mobile society, the key concept here is technology. Technology, which despite President Obama's comments, more than doubles in its advancement roughly every eighteen months per what has come to be known and proven as "Moore's Law." Gordon E. Moore, "Cramming More Components Onto Integrated Circuits," *Electronics Magazine* (1969). What Petitioner fails to address or acknowledge is that along with the growing demand for telecommunication service has come the need for and the advancement of technology to support that demand.

Telecommunication carriers have and are working to develop better, smaller and cheaper technology to be used to increase coverage and capacity in their networks. Miniaturization of cellular antennas and transmission equipment is already occurring. Since 2010, carriers have had and deployed "picocells" – miniature antennas that can be attached to sides of buildings and on small poles that operate to *augment* coverage and capacity in small areas. Distributed Antenna Systems have nodes that include both the transmission equipment and the antennas in small

packages that are mounted on utility poles, in stadiums and buildings. Carriers already deploy "femtocells" (mini-towers) that you can use in your own home to boost coverage. It is more than conceivable, particularly as the infrastructure for true 4G LTE telecommunication service is put in place, that in as little as another decade multi-story cellular towers will be dinosaurs. As such, the need is paramount, now more than ever, to allow land use decisions to remain in the province of local governments that can require simple co-location of cell sites and additional advanced technologies to help protect important areas from these large structures.

When infrastructures were new and first developing, cellular devices were nothing more than radios and were completely dependent upon "RF signals" from cellular towers. In the 1990s, we saw commercial and industrial zoned sites quickly taken over by these towers, leaving local governments more than a decade later to deal with inevitable requests to place these certain-to-be-outdated structures in their residential oases. Thus, we have the instant Application to site an eleven story tower, 25 feet higher than any tree in the area, in the middle of a lakeside residential neighborhood. This is exactly why Congress saw fit and specifically determined that there were legitimate state and local concerns involved in regulating the siting of such facilities that could not be mandated on a federal level in the Telecommunications Act. *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1213 (11th Cir. 2002). In enacting § 332(c)(7), Congress expressly preserved the sanctity

of the local zoning decision: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities."

As a result, there are only four substantive and two procedural limitations upon the authority of state or local governments to regulate the construction of facilities for wireless communication services. *Id.* at 1214-1215. One such procedural requirement is that the local authority must rule on any Application within a reasonable time period. Petitioner argues that local government decisions are impeding and delaying deployment of telecommunication systems. However, the City herein timely processed and ruled on Petitioner's Application. It is the Petitioner's insistence and persistence in pursuing the alleged violation of the other procedural requirement that a decision be in writing that is causing delay. Instead of allowing the determination of the merits of the denial by the City under the substantive standards of the Act, Petitioner is before this District Court to insist that "in writing" means more than the simple terms. Moreover, this issue could have been determined pursuant to a Motion to Dismiss at the outset of the litigation in 2010, and the Court could have simply sent the matter back to the City for a better "writing" demanded by Petitioner, as other district courts have done. The case would have then quickly moved on to the merits.

Contrary to the assertions, neither lack of technology nor delay and interference by local government are at issue and thus cannot provide a "compelling reason" to grant the Petition. Such arguments have nothing to do with the true nature of this case and do not meet Petitioner's burden to show an important federal question that needs this Court's review.

2. This case concerns the City of Roswell's denial, pursuant to the factors set forth in its City Ordinance Article 21.2, "Standards for Siting Wireless Communications Facilities," of an Application by T-Mobile to place an eleven story cellular tower in the heart of the City's oldest lakeside community to *improve* its *existing* service to its customer base. On May 10, 2010, T-Mobile filed an action in the United States District Court for the Northern District of Georgia alleging that the City's denial was not supported by substantial evidence in the record and would have the effect of prohibiting the provision of wireless service in violation of the Act.[1] T-Mobile also sought an injunction compelling the City to grant it the requested permit for the tower. Although noting in its Verified Complaint that the letter issued by Roswell setting forth the denial of the Application did not contain reasons for the denial, T-Mobile did not allege that this failure violated a requirement under the Act. Following a lengthy discovery period

[1] T-Mobile withdrew its initial claim that this denial had the effect of unreasonably discriminating among providers of functionally equivalent services. (Doc.103).

which T-Mobile instigated,[2] both parties moved for summary judgment. (Pet. App. 22a.) In its motion, T-Mobile asserted and argued for the first time that the City's letter failed to meet the "in writing" requirement of the Act.

On March 27, 2012, the District Court granted T-Mobile's motion for summary judgment finding that, despite the City's Ordinance which set forth the factors to be considered, a letter sent the day after the hearing before the Mayor and Council stating the Application was denied and that the Minutes of the meeting were available, comprehensive Minutes of the meeting which included a motion setting forth detailed reasons pursuant to the City Ordinance to deny the Application and a verbatim transcript of the hearing, the City did not meet the requirements of the "in writing" requirement because it did not provide a separate written denial that set forth the specific reasons the Application was denied. (Pet. App. 34a.) Elevating form over substance, based on this presumed technical defect in the City's letter of denial the court issued an injunction requiring the City to grant T-Mobile's Application for the cellular tower without ever considering the true substantive constraint of the Act on a City's decision, i.e., whether

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[2] The City desired to bifurcate the case into two parts, first dealing with the "substantial evidence in the record test" and then moving to the other expert based issues, forgoing discovery and allowing immediate motions that would have included the issue at bar with no delay in the federal district court.

the City's decision to deny same was "supported by substantial evidence contained in a written record." (Pet. App. 35a.)

In arguing that specific reasons for a decision are necessary for effective substantive review and must be contained in the denial letter, though clearly not within the words of the statute, both the District Court and Petitioner ignore that after the discussion between applicant and the City Council where various reasons and concerns were discussed, a specific motion was made by Council Member Price to deny the Application stating that:

> I think based on our ordinance, Article 21.2.1, . . . the purpose and intent of our cell phone ordinance to protect the residential areas from the adverse impact of telecommunications towers and to minimize the number of towers and the other adverse impacts being minimized.
>
> I think the conclusion from that first section would be that this is aesthetically incompatible and certainly in this area. It's other than I-1, C-3, offices or highway commercial area [zoning districts].
>
> Number two, the alternative tower that was proposed, in my opinion, it would not be compatible with the natural setting and surrounding structures also due to the height being greater than the other trees.
>
> And, number three, in our Ordinance Article 21.2.4, the proximity to residential structures,

> the nearness to other homes, and being within the residential zoning area and adjacent properties, therefore, the adverse effects to the enjoyment of those neighbors and potential loss of resale value, among other potential parameters are difficult really to definitively assess.
>
> Therefore, overall, I move to deny the application for the wireless facility mono-pine tower on Lake Charles Drive.

(Pet. App. 8a.) This motion was seconded by two Council members and then unanimously approved. (Pet. App. 15a.) It can and must be readily inferred that the Council was in complete agreement both as to the reasons set forth and the denial. The reasons, though not in the letter, were right there in the Minutes and transcript of proceedings.

3. In *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013),[3] the Eleventh Circuit adhered to its longstanding precedent of statutory

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[3] It is interesting to note that T-Mobile chose not to appeal the *City of Milton* decision directly, even though it sought and was denied an *en banc* hearing in that case. The Opinion on appeal relies completely upon the reasoning and holding in *City of Milton*, the only differentiating facts being that the District Court in *City of Milton* bifurcated the substantive issues to provide an expedited decision on whether Milton's denial was supported by substantial evidence in the record. As a part of this process, when the "in writing" issue was raised (Milton had sent simple letters of denial exactly like Roswell), the District Court sent the matter back to the City to redraft the denial letter to include the reasons for its denial.

interpretation, refusing to add to or alter the plain language of the Act, and ruled that the straightforward language of § 332(c)(7)(B)(iii) that "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities *shall be in writing* and supported by substantial evidence contained in a written record," requires only that the decision to deny be "in" a "written document." In that case, as in Respondent's case, the writing was a letter to T-Mobile stating that the Application had been denied.

The *City of Milton* decision went further to state that there obviously "must be reasons for the denial that can be gleaned from the denial itself or from the written record; otherwise, there would be nothing for substantial evidence to support. What is neither expressed nor implied, however, is any requirement that the reasons for a denial must be stated in the letter or some other document that announces the decision, if there is a separate document doing that, or any prohibition against having the reasons stated only in the hearing transcript or minutes." *Id.* at 1283. Therefore, finding that "to the extent that a decision must contain grounds or reasons or explanations as required by other district courts, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." *Id.* at 1285.

The *City of Roswell* decision at bar simply adopted this rationale and then looked at the facts to see that the "in writing" burden had been met. It correctly

held that the letter to T-Mobile stating the Application had been denied, along with the Minutes and transcripts of the meeting which contained the reasons for the denial, collectively were enough to satisfy the "in writing" requirement of § 332(c)(7)(B)(iii).

REASONS TO DENY THE PETITION

Although Respondent firmly believes that the paramount reason to deny the Petition is the failure to show an important federal issue that actually impacts the rights of the Petitioner and its industry, it has responded to the arguments of Petitioner *seriatim*, for the Court's ease of reference.

1. There Is No Split in Authority Warranting the Court's Intervention.

While § 332(c)(7)(B)(iii) provides only that a decision to deny "shall be in writing," it is true that some early Circuit Court decisions imposed the obviously unstated requirements that this "writing" be separate from the written record and describe the reasons for the denial. However, the Circuits are quite clearly resolving this procedural matter and finding middle ground on their own. Indeed, contrary to Petitioner's assertions, the majority of Circuit Courts have now adopted or effectively employ this middle ground for the "in writing" requirement.

The additional mandates (above and beyond those written in the statute) began in the First Circuit holding in *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001) and were then adopted by the Ninth Circuit in *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 722 (9th Cir. 2005). These decisions were in direct response to the Fourth District's holding in *AT & T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-313 (4th Cir. 1999), that a local authority could simply stamp "DENIED" on the Application and meet the "in writing" procedural requirement. As a knee-jerk response that a stamp could not equate to a "writing," these decisions stated that there must be a separate letter stating that the Application was denied. Determining that the reasons for the denial were a necessary part of the separate substantive review of whether there was "substantial evidence in the record," the First Circuit rationalized that those reasons should be set forth in the denial letter.

As time progressed, the Circuit Courts adopted a middle ground between the two camps. *See Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 604-607 (6th Cir. 2004) (resolution in the record which set forth reasons was sufficient); *U.S. Cellular v. Board of Adjustment*, 180 Fed. Appx. 791, 798-801 (10th Cir. 2006) (Board meeting Minutes and letters not condensed into a formal denial document were deemed sufficient to meet the "in writing" requirement); *Helcher v. Dearborn County*, 595 F.3d 710, 721 (7th Cir. 2010) (reason for denial must be in

writing but Minutes of the Meeting satisfied the "in writing" requirement where the Minutes delineated the issues that arose with the Application and reasons for denial); *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013) (a written letter stating that the Application was denied with meeting Minutes or other writings citing the reasons for the denial was sufficient to meet the "in writing" requirement). Indeed, in *Omnipoint*, the Sixth Circuit backed down from its earlier concurrence with the First and Ninth Circuits in *New Par v. City of Saginaw*, 301 F.3d 390, 395-396 (6th Cir. 2002), that a separate writing stating the denial and the reasons for the denial was required. In other words, for the now majority, there need only be a separate writing that the local authority denied the request and then the written record can contain reasons for the denial deemed necessary for substantive review under the separate "substantial evidence" test.

In *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the Eleventh Circuit joined this middle ground in finding that the decision need only be in writing (a separate written letter of denial) and that to the extent reasons were required the courts should look to all the writings (meeting Minutes and transcripts of the proceedings).

> All that statutory provision requires of the denial decision is that it be in writing and be supported by substantial evidence in a written record. Whether the denials in this case were supported by substantial evidence in

> the written record is not before us, but the existence of that additional requirement necessarily means that there must be reasons for the denial that can be gleaned from the denial itself or from the written record; otherwise, there would be nothing for substantial evidence to support. What is neither expressed nor implied, however, is any requirement that the reasons for a denial must be stated in the letter or some other document that announces the decision, if there is a separate document doing that, or any prohibition against having the reasons stated only in the hearing transcript or minutes.

Id. at 1285. Following this decision, in the instant matter the Eleventh Circuit determined that there was a separate letter of denial by the City of Roswell and both the meeting Minutes and transcript of the proceeding contained the reasons for the decision. (Pet. App. 15a.)

Although the First and Ninth Circuits have not yet changed their earlier rulings, there is ample reason to believe that, like the Sixth Circuit, if faced with the issue in this new era of decisions, they too would move toward middle ground. *Dicta* in other circuits indicate that they would follow the current majority. *See Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (The Fifth Circuit, in a different zoning context, cautioned that requiring a local zoning authority to provide judicial-type findings from the record evidence shifts the function of a member of a zoning board from that of a legislator deciding the best course for the community to that

of a judge adjudicating the rights of contending petitioners).

As shown above, the District Courts are already moving to a middle ground and are coming to a consensus on what constitutes the "in writing" requirement. Going forward, it is easy to see that local jurisdictions will see fewer requests for these larger cellular towers as technology continues its progression. Furthermore, the majority appear to agree that a decision must be in a separate letter or writing and that the reasons can be contained in the Minutes or transcripts. In the two Circuits that require otherwise, local municipalities are clearly on notice and know that their denial letter must include reasons for the denial, which is likely nothing more than the reasons stated by Council members at the hearing as set forth in the record. Based on the current agreement in the other Circuits that the reasons do not have to be in a separate letter of denial, there is no important split in the Circuit Courts to warrant the Court's intervention and the Petition should therefore be denied.

2. The Question Presented Lacks Exceptional Importance and Does Not Need Resolution.

Determination of what constitutes "in writing" under § 332(c)(7)(B)(iii) does not raise an important federal question in this case. Irrespective of what stance the Court might take on the procedural "in writing" requirement, there will be no harm to or trampling of Petitioner's or the telecommunications

industry's rights. Either way, this case will go back to the District Court for determination on the merits of the substantive claims and protections under the Act, i.e., whether there is "substantial evidence in the written record" to support the denial and whether or not the denial has the effect of prohibiting the provision of wireless service in violation of the Act. Petitioner loses *nothing* here. There are no important federal rights to be protected.

The only thing that can come of a decision on this limited procedural issue is potential harm to the local governments, who could be forced to allow cellular towers based on a technical misstep without a determination of the merits of their decisions. It is not over-reaching to state that this cannot be what Congress intended. Historically, land use decisions have been the province of local government. *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). Land use regulation is "perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). Congress specifically preserved the elevated status of local government in land use decisions, including the siting of telecommunication towers in the very Act, allowing only four substantive limitations to local authority. It surely did not envision a loophole to benefit the telecommunication industry and undermine governmental authority in the four simple words "shall be in writing."

To the extent the lower courts need the reasons or specific rationale to conduct a "substantial evidence" review of the merits as argued by Petitioner, the

courts can simply look to the Minutes and transcripts of the hearing as the majority of Circuit Courts now allow. The facts of the cases readily show that this does not equate to a review of thousands of pages as suggested by Petitioner. The Minutes herein were 10 pages and the transcript approximately 108 pages. (Pet. App. 15a, 16a.) Furthermore, if the lower court did not feel that it could determine the reasons from the record, it could simply send it back down to the local authority for delineation of same as the district court did in *City of Milton*.

To allow Petitioner and the telecommunications industry to trump local government authority in land use decisions through the imposition of a technicality not intended by Congress and easily resolved by other means would be a travesty of justice that this Court should not entertain. Having failed to allege and show an important federal question that causes harm to or an invasion of Petitioner's rights, the Petition fails and should therefore be denied.

3. This Case is Neither the Ideal Vehicle Nor Does This Court Need to Resolve the Issue.

The instant case follows the new middle ground approach for handling the procedural "in writing" requirement. There is a separate writing setting forth the denial of the Mayor and Council on Petitioner's Application. Likewise, the reasons for that denial are easily found in the Minutes and transcript of the hearing. Specifically, the reasons were articulated in

Councilperson Price's Motion to Deny the Application. This motion, citing to and stating reasons from the City's Ordinance which sets forth the specific issues to be considered in determining such an Application, is all the lower court needs. Requesting more would be requiring findings of fact and conclusions of law, which is eschewed by all of the Circuit Court's, including the First and Ninth Circuits that first demanded a separate statement of reasons. *See Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001) (Formal findings of fact and conclusions of law are not required. Local zoning boards are primarily staffed by lay people and although their decisions are now subject to review under the Act, it is not realistic to expect highly detailed findings of fact and conclusions of law); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005) (Requiring findings of fact and conclusions of law would place an unduly heavy burden on lay zoning boards).

A better case to initiate review of this issue would be one where there was simply a stamp of denial and no Minutes or transcripts of the proceedings from which the district court could ascertain any rationale for a denial. This Court does not have before it such a case because given the progression of decisions since the Fourth Circuit's initial review of the issue in 1999, local governments know what to expect and what to do, as evidenced by the case at hand.

It makes no sense to review this middle ground approach adopted by the Eleventh Circuit and impose

additional requirements not set forth in the Act and not contemplated by Congress, when there is no harm to Petitioner and nothing to be gained but the stripping of local authority. The Petition should therefore be denied.

4. The Eleventh Circuit Correctly Applied Well-Established Principles of Statutory Construction to the Facts of This Case.

47 U.S.C. § 332(c)(7)(B)(iii) simply states that a decision to deny a request for a permit to erect a cellular tower must be "in writing" and "supported by substantial evidence contained in a written record." Petitioner seeks to read these requirements as one, when both the conjunction "and," as well as the legislative history, clearly separate and distinguish the two different elements in this limitation. The Eleventh Circuit's ruling in *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013),[4] which was applied to the instant case, was correct.

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[4] "The words of the statute we are interpreting require that the decision on a cell tower construction permit application be 'in writing,' not that the decision be 'in a separate writing' or in a 'writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held' or 'in a single writing that itself contains all of the grounds and explanations for the decision.' *See* 47 U.S.C. § 332(c)(7)(B)(iii). So, to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different

(Continued on following page)

Using well-settled rules of statutory construction, the statute's plain meaning requires only that a denial for a permit be "in writing." The City's decision was clearly reduced to writing in numerous forms, including the letter, Minutes and a detailed transcript, thereby complying with the statute. Neither the statute nor anything in its legislative history, requires that the "writing" provide the reasons for a local government's decision. The decision is consistent with the comity concerns underlying Congress's clear intent to maintain local zoning control in § 332(c)(7).

> written document or documents that the applicant is given or has access to. All of the written documents should be considered collectively in deciding if the decision, whatever it must include, is in writing.
>
> In this case the written documents available to T-Mobile include: . . . transcripts of the city council's hearings (one on each application) recounting the motions that were made and the reasons that were given for denying or conditionally approving each of the applications; the letters the City of Milton sent to T-Mobile two or three days after the city council hearing stating that two of the permit applications were denied and that one was approved subject to listed conditions; and the detailed minutes of the city council hearings, recounting all of the reasons for the action on each application along with the relevant discussion. T-Mobile had access to all of those documents before its deadline for filing the lawsuit, and collectively they are enough to satisfy the writing requirement of § 332(c)(7)(B)(iii). We need not consider whether something less than or different from all of those documents would be enough."

City of Milton, 728 F.3d at 1285.

"When legislation intrudes upon traditional state authority – like the local zoning authority – our republican structure instructs that "we should not quickly attribute to Congress an unstated intent." *Bellsouth Mobility, Inc. v. The Parish of Plaquemines*, 40 F.Supp.2d 372, 377 (E.D. La. 1999) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981)).

> "The starting point for interpreting a statute is the language of the statute itself. . . ." As a basic rule of statutory interpretation, we read the statute using the normal meanings of its words. . . . "Courts must assume that Congress intended the ordinary meaning of the words it used and, absent a clearly expressed legislative intent to the contrary, that language is generally dispositive." We are required to look beyond the plain language of the statute only when the language of the statute is unclear or ambiguous, when Congress has expressed an intent contrary to that suggested by the plain language, or when absurd results would ensue from adopting the plain language interpretation.

Consolidated Bank N.A. v. United States, 118 F.3d 1461, 1463-1464 (11th Cir. 1997) (citations omitted).

The language in question **is not** ambiguous – it requires that a denial be "in writing," or obviously in some written form. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001) ("Any ambiguity in the statutory language must result from the common usage of that language, ...").

Neither § 332(c)(7) nor any other section of the Act imposes **any** requirements on the writing's form or content. In contrast, and importantly, Congress plainly and specifically required certain content for other kinds of writings issued under the Telecommunications Act. *See, e.g.*, 47 U.S.C. § 252(e)(1) ("written findings as to any deficiencies" are required in connection with certain types of agreements); § 271(d)(3) (FCC is required to "state the basis for its approval or denial" of specific kinds of Applications). *See also* 47 U.S.C. § 204(a)(1) (Congress required the FCC to provide a carrier a "statement in writing of its reasons" for suspending charges); § 213(f) (Congress required that "reasons" be provided for denying access to certain records). This Court has declared "well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Pugliese v. Pukka Development, Inc.*, 550 F.3d 1299, 1303 (11th Cir. 2008) (quoting *Brown v. Gardner*, 513 U.S. 115, 120 (1994)).[5]

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[5] The report accompanying the Act does not provide "clear evidence" of a legislative intent contrary to the plain meaning of the words used. *See Alacare Home Health Services, Inc. v. Sullivan*, 891 F.2d 850, 856 (11th Cir. 1990) ("Generally a court will look to a statute's legislative history, if the statute is ambiguous, or to see whether Congress clearly expressed an intent contrary to the plain language of the statute."). The report identifies no form or content for the writing.

Employing basic rules of statutory construction, the Act requires that the decision to deny be in a written form. It does not require a separate document or "written findings" or a statement, description, or explanation of the bases or reasons for a denial. "Had Congress wished unique or specialized meanings to attach . . . it could have taken the obvious and usual step either of including a specialized meaning in the definitions . . . or by using clear modifying language in the text of the statute," just as it did in other sections of the same Act. *Consolidated Bank N.A.*, 118 F.3d at 1464. Section 332(c)(7)(B)(iii) requires just what it says – that a decision denying a permit be in written form.

The Court in *City of Milton* adhered to this approach and the mandates of this Court regarding such construction, articulating well why any other finding would run afoul of judicial construction:

> The temptation for judges to give in to the cardinal sin of statutory revision instead of confining themselves to the task of statutory interpretation is a strong one. The strength of that temptation is captured in an observation, attributed to H.G. Wells, that "[n]o passion in the world is equal to the passion to alter someone else's draft." But the words of Congress don't come to us in draft form. They don't come to us for editing or revision. They come to us as law. "'[W]e are not licensed to practice statutory remodeling.'" *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011). We must, instead, take

the model that Congress has constructed, perceived defects and all. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228, 128 S.Ct. 831, 841 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable."); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126, 110 S.Ct. 456, 460 (1989) ("Our task is to apply the text, not to improve upon it."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009) ("[W]e are not allowed to add or subtract words from a statute; we cannot rewrite it."); *Wright v. Secretary for Department of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002) ("Our function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to 'improve' statutes by altering them."); *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) ("We will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it.").

Our oft-stated rule against judicial revision of statutes finds plenty of anchor weight in the bedrock principle that we are a country of laws, not one ruled by the musings, whether pragmatic or otherwise, of the black-robed class. And there is another sound reason why judicial "improvement" of legislation, even in pursuit of noble interest, is not noble. Justice Holmes explained why courts should not change the rules of the game even when it seems that different rules might make more

> sense: "[A]lmost the only thing that can be assumed as certainly to be wished is that men should know the rules by which the game will be played. Doubt as to the value of some of those rules is no sufficient reason why they should not be followed by the courts. Legislation gives notice at least if it makes a change." Oliver Wendell Holmes, Jr., "Holdworth's English Law," 25 *Law Quarterly Review* 412, 414 (1909), quoted in Richard A. Posner, *The Essential Holmes 206* (1992). Judicial improvement of statutory language through aggressive interpretation is unfair to those whose actions satisfied the unimproved language but do not satisfy the "improvements" that the judiciary announces in the course of judging actions that have already been taken.

Id. at 1284-1285.

It is for Congress to say what the "in writing" requirement mandates and where it can be found. As the Eleventh Circuit said in *City of Milton*, to change the rules of the game for the local authority by adding to the statute would create the injustice of mandating an injunction when the merits of the decision had yet to be determined. Likewise, in the instant case, it would have been egregious for the Eleventh Circuit to let stand an injunction demanding the City approve the Petitioner's Application and allow a cellular tower in the middle of a residential community without considering the merits of the substantive requirements of the Telecommunications Act. The Eleventh

Circuit's decisions based on bedrock principles of statutory construction are both correct and just. There being no error in the *City of Roswell* decision appealed, there is no need for judicial review and the Petition should therefore be denied.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should clearly be denied.

Respectfully submitted, this the 19th day of March, 2014.

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REPLY BRIEF

No. 13-975

In The

Supreme Court of the United States

T-MOBILE SOUTH LLC

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner T-Mobile South LLC references the Rule 29.6 Statement included in its Petition For Certiorari.

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REPLY BRIEF FOR PETITIONER

Try as the City might, it is unable to undercut the plainly compelling need for review here. The conflict over how to construe the "in writing" requirement in 47 U.S.C. § 332(c)(7)(B)(iii) is widely acknowledged and irrefutable. The most the City can do is try is to rearrange the division of authority. Yet even that attempt fails. The City's attempts to downplay the significance of the question presented and the appropriateness of this case as a vehicle for resolving the conflict also lack merit. Finally, the City's defense of the decision below falls flat. Certiorari should be granted.

1. The City acknowledges that the Eleventh Circuit's holding conflicts with decisions from the First and Ninth Circuits. BIO 2-3, 17. At the same time, the City tries to minimize this conflict and to deny that the conflict extends beyond those circuits. Neither attempt is persuasive.

a. The City suggests that if given the chance, the First and Ninth Circuits would move towards a "middle ground" of allowing zoning authorities to satisfy the "in writing" requirement with statements in the administrative record. BIO 17. But the City offers zero evidence to support that assertion. And none exists. The First and Ninth Circuits' strict separate-writing requirements are now entrenched law in those jurisdictions. *See* Pet. 11 n.2 (citing several recent district court decisions within First Circuit finding violations of Section 332(c)(7)(B)(iii) for failure to provide reasons for denials in separate documents); *Sprint Spectrum L.P. v. County of San Mateo*, 2013 WL 6326489 *3-7 (N.D. Cal. Dec. 4, 2013) (finding violations of Act under Ninth Circuit's rule).

b. The Eleventh Circuit's holding conflicts not only with First and Ninth Circuit precedent, but also with law in the Sixth and Seventh Circuits.

The City claims that in *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 604-07 (6th Cir. 2004), the Sixth Circuit "backed down from its earlier concurrence with the First and Ninth Circuits in *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002), that a separate writing stating the denial and the reasons for the denial was required." BIO 16. But *Omnipoint* actually reaffirmed the holding in *New Par*. *See Omnipoint*, 355 F.3d at 605. The Sixth Circuit simply held in *Omnipoint* that a city council's resolution satisfied *New Par*'s separate writing requirement because it was "a writing separate from the hearing record" and it "contain[ed] the reasons for the denial as is required by *New Par*." *Omnipoint*, 355 F.3d at 606. The City's separate writing here, by contrast, provided no such reasoning.

The City also argues that the Eleventh Circuit's holding does not conflict with *Helcher v. Dearborn County*, 595 F.3d 710, 721 (7th Cir. 2010), because the Seventh Circuit there held that minutes from a zoning board's hearing satisfied Section 332(c)(7)(B)(iii)'s "in writing" requirement. BIO 15-16. Not so. The Seventh Circuit in *Helcher* explicitly stated that it was joining the First, Sixth, and Ninth Circuits. 595 F.3d at 719. The Eleventh Circuit, in contrast, said it "rejected" the law in those circuits. Pet. App. 14a. To the extent that *Helcher* diverges from the strict requirements in the First, Sixth, and Ninth Circuits that reasons for denials be provided in documents separate from the hearing record, *see* Pet. 10-11 & n.1; 595 F.3d at 719, the Seventh Circuit's holding still

conflicts with Eleventh Circuit's here. In *Helcher*, the Seventh Circuit insisted that a written decision "contain[] a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," 595 F.3d at 719, and held that the minutes there satisfied that requirement because they "cite[d] the specific provisions of the Ordinance that *the majority* of the voting members found were not met by the application," *id.* at 722 (emphasis added). Here, by contrast, the minutes merely list various concerns that councilmember Price and others expressed before Price made her motion to deny the application, Pet. App. 15a, leaving it unclear which of those reasons were the basis for the motion – and which, if any, garnered the support of a majority of the councilmembers who voted for it. *See* Pet. 19-21.

2. None of the City's attempts to downplay the significance of the question presented withstands scrutiny.

a. The City suggests the question presented will soon wane in importance because "local jurisdictions will see fewer requests for these larger cellular towers as technology continues its progression." BIO 18. But the City provides no support for this assertion. That is because none exists. There is every expectation that cellular towers will remain a vital component of our Nation's telecommunications infrastructure for the foreseeable future. *See, e.g., Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, ¶ 2 (2013) ("The ability of wireless providers to meet" the rapidly growing demand for wireless broadband services "will

depend not only on access to spectrum, but also on the extent to which they can deploy new or improved wireless facilities or cell sites.").

At any rate, Section 332 is not limited to traditional cell towers. Any personal wireless service facility is protected by Section 332(c)(7)(B), including those on buildings and Distributed Antenna Systems. *See, e.g., Crown Castle NG East v. Town of Greenburgh*, 2014 WL 185012 (2d Cir. Jan. 17, 2014) (Summary Order) (town denial of Distributed Antenna System application violated Section 332(c)(7)(B)(iii)); *T-Mobile Northeast LLC v. Borough of Leonia Zoning Bd. Of Adjustment*, 942 F. Supp. 2d 474 (D.N.J. 2013) (denial of application to install antennas on existing building violated Section 332(c)(7)(B)). Consequently, the question presented will remain important regardless of the precise types of wireless infrastructure deployed in the future.

b. The City contends that the majority's separate writing rule serves no real purpose because when municipalities fail to satisfy it, such failures can be remedied with remands to local authorities to specify the reasons for their denials of the permit applications. BIO 19-20. This is incorrect. As the district court here recognized, the proper remedy for a violation of the "in writing" requirement is "an injunction ordering issuance of a permit." Pet. App. 34a-35a (quotation marks and citation omitted). That is because one of the key purposes of Section 332(c)(7)(B) is to preclude local authorities from imposing unnecessary delays or costs upon the permitting process. *See* Pet. 5 (citing legislative history, administrative guidance, and case law to this effect). In keeping with that objective, the "in writing" requirement – in combination with the

directive that all cases challenging denials of permits be resolved "on an expedited basis," 47 U.S.C. § 332(c)(7)(B)(v) – demand that local authorities enable prompt and streamlined judicial review of their action. Allowing local authorities to obtain no-cost do-overs whenever they fail to specify reasons for denials of permits in writings separate from the administrative record would flout these statutory imperatives.

c. Finally, the City maintains that the minority rule is adequate to meet the telecommunication industry's concerns because "[t]o the extent the lower courts need the reasons or specific rationale to conduct a 'substantial evidence' review . . . the courts can simply look to the Minutes and transcripts of the hearing." BIO 19-20. But petitioner has already explained at length why such a system is inadequate and, indeed, unworkable. Pet. 18-21, 28. The City offers no response to those explanations.

3. The City asserts that this case is an unsuitable vehicle for resolving the circuit split because "the reasons for [the City Council's] denial are easily found in the Minutes and transcript of the hearing." BIO 20. Of course, the district court did not think so, noting after it pored through the administrative record that it found it "impossible . . . to discern" which of the concerns expressed in the minutes and at the hearing "commanded the support of a majority of the Council members." Pet. App. 30a. The Eleventh Circuit's view of the administrative record was less clear, but it does not matter. In at least three circuits, allowing the administrative record to provide the reasons for a permit denial violates Section 332(c)(7)(B)(iii) "[e]ven where the record reflects unmistakably the Board's

reasons for denying a permit." *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *see also* Pet. 11 (citing Sixth and Ninth Circuit law to this effect). Accordingly, this case squarely presents the issue over which the circuits are divided. And the issue is outcome-determinative. Pet. 21.

4. Apart from repeating the Eleventh Circuit's reasoning, the City advances two new arguments in defense of the holding below. Neither is convincing.

First, the City asserts that it would be improper to construe Section 332(c)(7)(B)(iii) as requiring local governments to specify reasons for denials in separate writings because the "clear intent" of the statute is "to maintain local zoning control" and the "ability [of localities] to protect their unique environs." BIO 5, 23. In fact, just the opposite is true. Congress enacted the statute in order to remove "impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005); Pet. 5-6 (citing cases and legislative history). Section 332(c)(7)(B)(iii) thus "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.* Interpreting Section 332(c)(7)(B)(iii) to allow local governments to conduct business as usual would thwart that congressional initiative.

Second, the City offers a structural argument. Pointing to other provisions of the Communications Act requiring the FCC and state regulatory agencies to provide reasons for various actions in writing, the City argues that Section 332(c)(7)(B)(iii) cannot be

construed to do the same because it lacks any such express language. BIO 25. But again, just the opposite is true. The four provisions to which the City points simply reinforce – each using slightly different verbiage – that decision makers generally need to specify their reasons for making decisions that affect the telecommunications industry. Section 332(c)(7)(B)(iii) is no different. It requires any denial of a permit to place, construct, or modify a personal wireless facility to be "in writing and supported by substantial evidence contained in a written record." The only way to construe this directive in the context of the provision's goal of facilitating expedited judicial review and limiting municipal authority is to require the denials to contain actual reasoning.

At the very most, Section 332(c)(7)(B)(iii) from the City's perspective clearly requires denials to be "in writing" but fails explicitly to state what information such writings need to transmit. But even if accurate, this characterization would simply make the "in writing" provision like others in the Communications Act, requiring a detailed statement of reasons for denial even absent explicit statutory language. For example, Section 224(f)(2) of the Act provides that an electric utility may deny access to its utility poles or conduits based on "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). Although the statute does not include any language addressing how the utility must reply or what information it must convey, the FCC's rules implementing that provision require an electric utility to produce a written explanation of its denial that "shall be specific, shall include all supporting evidence

and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards." 47 C.F.R. § 1.1403(b).

In short, requiring a party that is denying an application to explain the grounds for the denial to allow for meaningful judicial or administrative review is hardly uncommon or considered to be onerous. To the contrary, it is standard practice under the Act, regardless of exactly how the requirement is set forth in any given statutory subsection.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 13-975

In the Supreme Court of the United States

T-MOBILE SOUTH, LLC

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE COMPETITIVE CARRIERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE COMPETITIVE CARRIERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), Competitive Carriers Association ("Association") moves for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari filed by T-Mobile South, LLC in the above-captioned action. The Association has requested the consent to the filing of an *amicus curiae* brief from each of the parties to this case, but consent was withheld by Respondent City of Roswell, Georgia. The Association's brief is appropriate and will assist the Court in determining whether to grant the petition for a writ of certiorari in this case.

The Association is the nation's leading organization of competitive wireless providers and stakeholders. The licensed service area of the Association's more than 100 carrier members covers 95 percent of the United States. Headquartered in Washington, D.C., the Association advocates on behalf of its members and works to educate policymakers on key issues that affect its members' ability to compete and thrive.

The Association files briefs as *amicus curiae* in cases presenting issues of importance to the wireless industry. *E.g.*, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013). It also regularly advocates before Congress, the Federal Communications Commission, and the Administration (including the Office of Science and Technology Policy, the National Telecommunications and Information Administration, and other agencies) to ensure that its members' voices

and views are heard not only by policymakers, but also by the media and the general public.

The Association and its members have an interest in this case because the Eleventh Circuit's decision below exacerbates an already stark Circuit split over interpretation of the "in writing" requirement of section 332(c)(7)(B)(iii) of the Communications Act of 1934 (as amended by the Telecommunications Act of 1996). Left unchecked, this split is likely to weaken competition in jurisdictions adopting the Eleventh Circuit's rule. Given its longstanding commitment to a vibrantly competitive wireless industry, the Association appears as *amicus curiae*, urging the Court to grant review so it can resolve the Circuit split.

For these reasons, the Association respectfully requests that the Court grant leave to file this brief.

Respectfully submitted,

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March 20, 2014

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INTEREST OF *AMICUS CURIAE*

Competitive Carriers Association ("Association" or "CCA") is the nation's leading organization of competitive wireless providers and stakeholders. The licensed service area of the Association's more than 100 carrier members covers 95 percent of the United States. Headquartered in Washington, D.C., the Association advocates on behalf of its members and works to educate policymakers on key issues that affect its members' ability to compete and thrive.

The Association files briefs as *amicus curiae* in cases presenting issues of importance to the wireless industry. *E.g.*, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013). It also regularly advocates before Congress, the Federal Communications Commission, and the Administration (including the Office of Science and Technology Policy, the National Telecommunications and Information Administration, and other agencies) to ensure that its members' voices and views are heard not only by policymakers, but also by the media and the general public.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae's* intent to file this brief. Petitioner's counsel has consented to the filing of this brief, but Respondent's counsel has withheld consent. Consequently, *amicus curiae* has filed a motion for leave to file this brief.

The Association and its members have an interest in this case because the Eleventh Circuit's decision below exacerbates an already stark Circuit split over interpretation of the "in writing" requirement of section 332(c)(7)(B)(iii) of the Communications Act of 1934 (as amended by the Telecommunications Act of 1996). Left unchecked, this split is likely to weaken competition in jurisdictions adopting the Eleventh Circuit's rule. Given its longstanding commitment to a vibrantly competitive wireless industry, the Association appears as *amicus curiae*, urging the Court to grant review so it can resolve the Circuit split.

SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 (the "Act") is founded on Congress's mission of "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302(a). The wireless industry has made great strides in fulfilling Congress's mission. Over 97% of the total U.S. population is currently covered by at least one mobile broadband service provider, and the mass proliferation of broadband services has made the wireless industry a key player in the national economy.

In rural parts of the country, however, the lack of adequate choices among providers is marked. While 92.4% of non-rural Americans were covered by four or more mobile broadband service providers as of October 2012, only 37.4% of rural Americans had access to a similar amount of choice. Moreover, "coverage" is not coextensive with the actual provision of wireless services. Closing the "broadband availability gap" which affects millions of Americans – particularly

those in rural areas – remains the nation's great infrastructure challenge of the 21st century.

Many provisions of the Act, particularly those governing permit applications for siting (*i.e.*, building or modifying) wireless facilities, reflect Congress's effort to encourage the expansion of wireless services nationwide without unduly restricting the interests of state and local governments. In balancing these national and local concerns, the Act has enabled widespread innovation and economic growth in the wireless industry, which will be stymied unless there are ***uniform*** rules for the siting application process across the country.

In this case, petitioner highlights a Circuit split over interpretation of the "in writing" requirement of section 332(c)(7)(B)(iii) of the Act. The First, Sixth, Seventh, and Ninth Circuits interpret section 332(c)(7)(B)(iii) as requiring a local government to explain its reasons for denying a service provider's application for siting wireless facilities in the written denial of the application.[2] The Fourth Circuit and now the Eleventh, by contrast, hold that a local government may meet its obligations under section 332(c)(7)(B)(iii) simply by issuing a written statement that a siting application is "denied."[3]

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[2] *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *accord New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 723 (9th Cir. 2005); *Helcher v. Dearborn Cnty.*, 595 F.3d 710, 719 (7th Cir. 2010).

[3] *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-13 (4th Cir. 1999); *T-Mobile*

As a practical matter, the Circuit split "encourag[es] *** deployment on a reasonable and timely basis of advanced telecommunications capability" in majority jurisdictions, while discouraging deployment in minority jurisdictions. By forcing courts to review voluminous (or scant) administrative records to try to discern whether a local government has received and considered the "substantial evidence" necessary to deny a siting application, the minority rule invariably leads to more complex and time-consuming litigation. This prolonged process increases the costs associated with siting wireless facilities in minority jurisdictions.

In sum, the minority rule adopted by the Eleventh Circuit leads to two undesirable outcomes:

First, the minority rule generates costly and drawn-out litigation that interferes with Congress's goal of encouraging growth and competition in the wireless service industry.

Second, the minority rule impacts rural communities and communities of color—both of whom rely more heavily on mobile wireless broadband to access the Internet—disproportionately, as a result of the delayed deployment of wireless services in these areas of the country.

The Court should grant certiorari to resolve the Circuit split over the proper interpretation of section 332(c)(7)(B)(iii).

South, LLC v. City of Roswell, Ga., 731 F.3d 1213, 1220-21 (11th Cir. 2013) [Pet. App. 14a-15a].

ARGUMENT

I. The Circuit Split Stymies the Wireless Industry's Potential for Innovation and Economic Growth.

a. At the heart of the Telecommunications Act of 1996 (the "Act") is Congress's directive to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to ***all*** Americans." 47 U.S.C. § 1302(a) (emphasis added). Congress's prescient planning for the explosive growth of wireless data services was later reaffirmed in the Broadband Data Improvement Act of 2008, which codified Congress's perception that the "deployment and adoption of broadband technology is vital to ensuring that our nation remains competitive and continues to create business and job growth." 47 U.S.C. § 1301(2). President Obama has also stressed that access to broadband "is essential to the Nation's global competitiveness in the 21st century, driving job creation, promoting innovation, and expanding markets for American businesses." Exec. Order No. 13616, 77 Fed. Reg. 36903 (June 14, 2012) ["Accelerating Broadband Infrastructure Deployment"].[4] The President has even vowed to "make it possible for businesses to deploy the next generation of high-

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[4] *Available at* http://www.gpo.gov/fdsys/pkg/DCPD-201200474/pdf/DCPD-201200474.pdf.

speed wireless coverage to 98 percent of all Americans" by 2016.[5]

Over the last few years, the wireless industry has responded enthusiastically to this clarion call for ubiquitous broadband services. As the Federal Communications Commission ("Commission" or "FCC") has acknowledged, "tremendous efforts are being made by the private sector, the Commission, and other governmental entities to bring broadband to all Americans."[6] For example, between June 2010 and June 2011, the percentage of Americans without access to mobile broadband services with download speeds of at least three megabits per second (Mbps) and upload speeds of 768 kilobits per second (kbps) shrank from an estimated 21.4% to 6.2%.[7]

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[5] The White House, Office of the Press Secretary, "Remarks by the President in State of Union Address" (Jan. 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

[6] FCC, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Ninth Broadband Progress Notice of Inquiry, 27 FCC Rcd. 10523, ¶ 3 (2012).

[7] FCC, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capacity to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act* , Eighth Broadband Progress Report, 27 FCC Rcd. 10342, ¶ 86 (2012). Note, however, that projections for both years may be overstated. *Id.* at ¶ 40.

Because of its continuing efforts to extend broadband services to all Americans, the wireless industry has become a critical player in the domestic economy, contributing "more than $150 billion in GDP annually[.]"[8] *See also* CCA, "A Framework for Sustainable Competition in the Digital Age: Fostering Connectivity, Innovation, and Consumer Choice," at 5 (Dec. 4, 2013) ["CCA White Paper"] (stating that the wireless industry contributed "$146.2 billion to the nation's GDP in 2011" alone).[9]

Continued expansion and job growth are anticipated. The FCC has estimated that wireless broadband capital expenditures would "increase steadily" by billions of dollars between 2012 and 2015.[10] And a recent study commissioned by the PCIA – The Wireless Infrastructure Association concluded that "indus-

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[8] The White House, Office of the Press Secretary, "FACT SHEET: Administration Provides Another Boost to Wireless Broadband and Technological Innovation" (June 14, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/14/fact-sheet-administration-provides-another-boost-wireless-broadband-and-.

[9] *Available at* http://competitivecarriers.org/wp-content/uploads/2014/01/CCA_SustainableCompetition_ FINAL.pdf.

[10] FCC, Connecting America: National Broadband Plan, Ch. 4 at 40 (2010), *available at* http://www.broadband.gov/plan/. Current reports of the nation's leading wireless providers' capital expenditure appear to corroborate the FCC's estimate. *See* Sarah Reedy, Light Reading: Networking the Telecom Community, "SDN, NFV Not Slashing Wireless Capex Yet" (March 7, 2014), *available at* http://www.lightreading.com/carrier-sdn/nfv-(network-functions-virtualization)/sdn-nfv-not-slashing-wireless-capex-yet/d/d-id/708107.

try projected mobile broadband investments" will "increase GDP in 2017 by 1.6 to 2.2% ($259.1 to $355.3 billion in dollar terms) and generate up to 1.3 million net new jobs[.]"[11] Given these statistics, the wireless industry is inarguably an "essential engine of U.S. economic growth[.]" CCA White Paper, *supra*, at 5.

In an effort to unleash the wireless industry's potential for innovation and economic growth, the FCC strives to "reduce barriers to wireless infrastructure investment."[12] To preserve the industry's upward trajectory, "unnecessary or unclear regulatory requirements and processes" must be swiftly addressed and resolved.[13] When local governments foment "lengthy and unreasonable delays" in the siting process, they impede the deployment of wireless broadband services.[14] Continued innovation and economic growth in the wireless industry thus depend on *uni-*

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[11] Alan Pearce, Richard Carlson, and Michael Pagano, "Wireless Broadband Infrastructure: A Catalyst for Job Growth 2013-2017," at 1 (2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520949634.

[12] FCC, *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies etc.*, Notice of Proposed Rulemaking, 2013 WL 5405395, ¶ 4 (2013).

[13] *Id.*

[14] FCC, *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd. 13994, 14004-06 (2009), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff'd sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013).

form rules across the country to facilitate the siting application process.

b. Petitioner highlights an intractable Circuit split regarding interpretation of the "in writing" requirement of section 332(c)(7)(B)(iii) of the Act. In the First, Sixth, Seventh, and Ninth Circuits, a local government has not satisfied the requirements of section 332(c)(7)(B)(iii) unless its written decision "contain[s] a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons."[15] By contrast, in the Fourth and Eleventh Circuits – which subscribe to the minority rule – a local government may ostensibly meet its obligations under section 332(c)(7)(B)(iii) simply by issuing a written statement that a siting application is "denied."[16]

c. The Act requires judicial review of permitting decisions by local authorities "on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). The minority rule frustrates this mandate by requiring courts to examine voluminous (or scant) administrative records in an attempt to guess the reasons for a local government's decision to deny a siting application. This invariably

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[15] *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *accord New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 723 (9th Cir. 2005); *Helcher v. Dearborn Cnty.*, 595 F.3d 710, 719 (7th Cir. 2010).

[16] *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-13 (4th Cir. 1999); *T-Mobile South, LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1220-21 (11th Cir. 2013) [Pet. App. 14a-15a].

leads to more complex and time-consuming litigation, which – in turn – increases costs of siting wireless facilities and significantly delays the deployment of wireless services in minority jurisdictions.

The majority rule mitigates these risks, focusing on the "reviewing court" and its ability to quickly "evaluate the evidence in the record[.]" *Todd*, 244 F.3d at 60. In majority jurisdictions, a local government's written decision informs a service provider's choice to pursue litigation over a permitting decision and makes any subsequent judicial review process more efficient and economical. In minority jurisdictions, where stamping the word "denied" on a siting application may be sufficient to satisfy the requirements of section 332(c)(7)(B)(iii), parties and reviewing courts have no such guide.

d. The question presented by this case is of vital importance to the wireless industry and to consumers in minority jurisdictions. This Court should grant review so that it can reestablish Congress's intent to provide a uniform, nationwide standard concerning the requirements imposed upon state and local governments under section 332(c)(7)(B)(iii).

II. The Circuit Split Will Marginalize Consumers of Wireless Broadband Services in Rural Areas and Among Communities of Color.

a. Currently, there is a disparity between the number of mobile broadband service providers in urban versus rural parts of the country. While 92.4% of non-rural Americans were covered by four or more mobile broadband service providers as of October 2012, only 37.4% of rural Americans had access to a

similar amount of choice.[17] There is a critical difference, however, between ***coverage*** and the ***actual provision*** of wireless services: "A provider's having network coverage in an area does not mean that a provider actually offers its service to residents in all of that area." FCC, 16th Wireless Competition Report, *supra*, at ¶ 44.

Against this backdrop, the FCC declared the provision of broadband services to all Americans as "*the* great infrastructure challenge of the 21st century," when nearly "100 million Americans do not have broadband today." FCC, National Broadband Plan, *supra*, Ch. 1 at 19 (emphasis in original). In its "last three broadband progress reports, the Commission found that 'advanced telecommunications capability' was not being deployed to ***all*** Americans in a reasonable and timely fashion." FCC, Ninth Broadband Progress Notice of Inquiry, *supra*, at ¶ 3 (emphasis added). A 2011 study commissioned by CCA (then known as the Rural Cellular Association) concluded that rural America "comprises the largest portion of unserved and underserved broadband population."[18]

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[17] FCC, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Mobile Competition Report, 28 FCC Rcd. 3700, ¶ 2 at 28 (2013) ["16th Wireless Competition Report"].

[18] Raul L. Katz, Javier Avila, and Giacomo Meille, "Economic Impact of Wireless Broadband in Rural America," Executive Summary, at 6 (2011), *available at* http://competitivecarriers.org / wpcontent / uploads / 2011 / 02 / Economic – Study – Executive Summary-02.24.11.pdf; *see also* FCC, Ninth Broadband Pro-

b. Predictably, the nation's largest carriers do not prioritize rural fixed or mobile broadband capital investment. Katz *et al.*, *supra*, at 6. Sparsely populated geographical areas, such as rural communities, pose a unique challenge to service providers: "Because service providers in [low population density] areas cannot earn enough revenue to cover the costs of deploying and operating broadband networks, including expected returns on capital, there is no business case to offer broadband services in these areas." FCC, National Broadband Plan, *supra*, Ch. 8 at 136. But there are strong reasons to encourage such investment. Wireless infrastructure is generally less expensive to build than fixed wireline infrastructure, and wireless services are often the only avenue for providing broadband access to rural communities. Impoverished and minority communities also rely more heavily on wireless services as their primary or only source of Internet access.[19]

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gress Notice of Inquiry, *supra*, at ¶¶ 3, 37-38 (recognizing that "people living in rural and on Tribal lands are disproportionately lacking" access to broadband services); Hanns Kuttner, Hudson Institute, "Broadband for Rural America: Economic Impacts and Economic Opportunities," at 18 (2012), *available at* http://www.hudson.org/content/researchattachments/attachment/1072/ruraltelecom-kuttner--1012.pdf ("[R]ural America stands at a precipice. A growing technology gap looms. Without broader access to broadband capacity, rural America will lack one of the necessary tools to contain, if not narrow, the gap.")

[19] U.S. Census Bureau, Pub. No. P20-569, *Computer and Internet Use in the United States: Population Characteristics*, at 12 (2013), *available at* http://www.census.gov/prod/2013pubs/p20-569.pdf ["Census Study"] ("When compared to percentages of home Internet use, smartphones appear to be leveling the In-

The FCC has concluded that closing the "broadband availability gap requires financial support from federal, state and local governments." FCC, National Broadband Plan, *supra*, Ch. 8 at 138. But public funding for the deployment of wireless broadband services in rural areas cannot mitigate the additional economic and non-economic costs to wireless service providers resulting from the minority interpretation of section 332(c)(7)(B)(iii) of the Act.

Litigating denials of siting applications in minority jurisdictions is extremely expensive and time-consuming. Left unchecked, the costs and delays associated with the minority rule will stifle the numerous "economic and employment benefits enabled by the deployment of wireless broadband infrastructure" – benefits which are themselves "contingent on broad access by consumers regardless of their income or location (rural or urban)." Pearce *et al.*, *supra*, at 27; Katz *et al.*, *supra*, at 8 ("unless these [rural] communities are given the opportunity to connect to the Internet, they will remain permanently marginalized and the economic penalty would be significant.").

c. In sum, access to broadband will be hobbled in rural, impoverished, and minority communities within the Fourth and Eleventh Circuits, defeating Congress's express purpose to extend advanced telecommunications services at a timely pace to ***all*** Ameri-

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ternet use disparities traditionally present for race and ethnicity groups. While 27 percentage points separated the highest and lowest reported rates of home Internet use[,] *** a smaller gap of 18 percentage points emerged once smartphone use was factored into overall connectivity rates[.]").

cans. 47 U.S.C. § 1302(a). It will also frustrate President Obama's goal of extending high-speed wireless services nationwide. *See* "Remarks by the President in State of Union Address," *supra.* This Court can abate these risks by resolving, decisively, the correct interpretation of section 332(c)(7)(B)(iii) of the Act.

III. The Circuit Split Will Perpetuate the Trends of Increased Market Concentration and Decreased Competition Among Wireless Providers in Rural Areas.

a. The Association is particularly concerned with the adverse impact the minority rule may have upon competition in the wireless industry. Competition is vital to the health and vibrancy of the industry, because: (1) "where effective competition exists, heavy-handed, utility-style regulation is unnecessary"; and (2) "robust competition protects consumers in more dynamic and effective ways than regulation." CCA White Paper, *supra*, at pp. 3, 18. "For the last three years," however, "the Commission was unable to certify that the mobile wireless industry is characterized by 'effective competition,' confirming the highly (and increasingly) concentrated nature of the wireless industry in the hands of the two largest providers," *i.e.*, AT&T and Verizon. *Id.* at 2 (citing FCC, 16th Wireless Competition Report, ¶¶ 14-15).

The Commission concluded that the market for wireless services is currently in a "highly concentrated" state, meaning that the aggregate of wireless consumers nationwide subscribe to a small group of service providers. FCC, 16th Wireless Competition Report, *supra*, ¶ 59. This market concentration becomes even more pronounced as population density declines in a given area. *Id.* at ¶ 60. For this reason, less

populated (*e.g.*, rural) areas generally see decreased competition among wireless service providers. If this trend continues, smaller competitors in the industry – including the Association's members – will be increasingly excluded from providing their services to consumers nationwide, including those in rural areas.

b. Effective competition hinges on the removal of barriers to entry by competitors, especially smaller wireless service providers. As discussed above, wireless carriers already face substantial economic hurdles when seeking to enter rural markets. *See* Katz *et al.*, *supra*, at 6; FCC, National Broadband Plan, *supra*, Ch. 8 at 136. The increased cost of litigating denials of siting applications in minority jurisdictions poses an additional economic hurdle, especially for smaller service providers, and thereby promotes the *status quo* of greater market concentration and decreased competition in rural areas. *See* FCC, 16th Wireless Competition Report, ¶¶ 59-60.

CONCLUSION

For the foregoing reasons, Competitive Carriers Association joins Petitioner in urging the Court to grant a petition for a writ of certiorari.

Respectfully submitted,

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March 20, 2014

JOINT APPENDIX

No. 13-975

IN THE

Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 12, 2014
CERTIORARI GRANTED MAY 5, 2014

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA (ATLANTA)

Civil Docket for Case #: 1:10-cv-01464-AT

T-MOBILE SOUTH, LLC

v.

CITY OF ROSWELL, GEORGIA

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
05/13/2010	1	COMPLAINT filed and summon(s) issued. Consent form to proceed before U.S. Magistrate and pretrial instructions provided. (Filing fee $ 350 receipt number 24423), filed by T-Mobile South, LLC. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3 - Part 1, # 4 Exhibit 3 - Part 2, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14, # 16 Summons issued, # 17 Civil Cover Sheet)(pdw) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 05/17/2010)
05/13/2010	2	Corporate Disclosure Statement by T-Mobile South, LLC identifying

DATE	NO.	PROCEEDINGS
		Corporate Parents Deutsche Telekom AG, T-Mobile USA, Inc., T-Mobile Global Zwischenholding GmbH, and T-Mobile Global Holding GmbH for T-Mobile South, LLC.(pdw) (Entered: 05/17/2010)
05/19/2010	3	ORDER OF RECUSAL. Judge Marvin H. Shoob recused. Case reassigned to Judge Richard W. Story for all further proceedings. Signed by Judge Marvin H. Shoob on 05/18/2010. (rvb) (Entered: 05/19/2010)
05/19/2010	4	NOTICE to All Counsel of Record: The above styled case was reassigned to the Honorable Richard W. Story from the Honorable Marvin H. Shoob. (rvb) (Entered: 05/19/2010)
05/24/2010	5	Return of Service Executed by T-Mobile South, LLC. City of Roswell, Georgia served on 5/17/2010, answer due 6/7/2010. (Taylor, Scott) (Entered: 05/24/2010)
06/01/2010	6	NOTICE of Appearance by Richard A. Carothers on behalf of City of Roswell, Georgia (Carothers, Richard) (Entered: 06/01/2010)
06/01/2010	7	NOTICE of Appearance by Regina Benton Reid on behalf of City of Roswell, Georgia (Reid, Regina) (Entered: 06/01/2010)

DATE	NO.	PROCEEDINGS
06/07/2010	8	ANSWER to 1 COMPLAINT by City of Roswell, Georgia. Discovery ends on 11/4/2010. (Carothers, Richard) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 06/07/2010)
07/06/2010	9	Joint PRELIMINARY REPORT AND DISCOVERY PLAN filed by T-Mobile South, LLC, City of Roswell, Georgia. (Taylor, Scott) (Entered: 07/06/2010)
07/07/2010	10	Initial Disclosures by City of Roswell, Georgia. (Carothers, Richard) (Entered: 07/07/2010)
07/08/2010	11	Initial Disclosures by T-Mobile South, LLC.(Taylor, Scott) (Entered: 07/08/2010)
07/08/2010	12	SCHEDULING ORDER approving 9 Preliminary Report and Discovery Plan except as herein modified: the parties will report back to the Court prior to the conclusion of the four month discovery period provided for under the Local Rules if one or both parties believe that additional time for discovery is necessary. Signed by Judge Richard W. Story on 7/08/2010. (pdw) (Entered: 07/08/2010)

DATE	NO.	PROCEEDINGS
08/03/2010	13	CERTIFICATE OF SERVICE of *Defendant City of Roswell's First Interrogatories to Plaintiff* by City of Roswell, Georgia. (Reid, Regina) (Entered: 08/03/2010)
08/03/2010	14	CERTIFICATE OF SERVICE of *Defendant City of Roswell's First Request for Production of Documents to Plaintiff* by City of Roswell, Georgia. (Reid, Regina) (Entered: 08/03/2010)
09/07/2010	15	CERTIFICATE OF SERVICE by T-Mobile South, LLC.(Taylor, Scott) (Entered: 09/07/2010)
09/28/2010	16	Joint MOTION for Protective Order by T-Mobile South, LLC. (Attachments: # 1 Exhibit A -- Stipulated Protective Order)(Barr, Jonathan) (Entered: 09/28/2010)
09/29/2010	17	STIPULATED PROTECTIVE ORDER Signed by Judge Richard W. Story on 9/29/2010. (tcc) (Entered: 09/30/2010)
10/20/2010	18	PROPOSED CONSENT ORDER Extending Discovery Period. (Taylor, Scott) (Entered: 10/20/2010)
10/21/2010	19	Request for Leave of Absence for the following date(s): 11/22/10, 11/23/10, 11/24/10, 11/29/10, 11/30/10, 12/1/10, 12/20/10, 12/21/10. 12/22/10, 12/23/10, 12/24/10, 12/27/10, 12/28/10, 12/29/10, 12/30/10,

DATE	NO.	PROCEEDINGS
		12/31/10, 01/03/11, 01/04/11 and 01/05/11, by Regina Benton Reid. (Reid, Regina) (Entered: 10/21/2010)
10/22/2010	20	CONSENT ORDER extending time for Discovery. Discovery ends on 1/7/2011. Signed by Judge Richard W. Story on 10/21/2010. (pdw) (Entered: 10/22/2010)
11/04/2010	21	Supplemental Initial Disclosures by T-Mobile South, LLC.(Taylor, Scott) (Entered: 11/04/2010)
11/04/2010	22	CERTIFICATE OF SERVICE filed by T-Mobile South, LLC (Taylor, Scott) (Entered: 11/04/2010)
12/02/2010	23	CERTIFICATE OF SERVICE *of Defendant's Objections and Responses to Plaintiff's First Interrogatories* by City of Roswell, Georgia.(Reid, Regina) (Entered: 12/02/2010)
12/02/2010	24	CERTIFICATE OF SERVICE *of Defendant's Objections and Responses to Plaintiff's First Request for the Production of Documents* by City of Roswell, Georgia. (Reid, Regina) (Entered: 12/02/2010)
12/16/2010	25	PROPOSED CONSENT ORDER Extending Discovery Period. (Reid, Regina) (Entered: 12/16/2010)

DATE	NO.	PROCEEDINGS
12/17/2010	26	CONSENT ORDER extending Discovery period to and including 2/21/2011. Signed by Judge Richard W. Story on 12/17/10. (cem) (Entered: 12/20/2010)
02/11/2011	27	PROPOSED CONSENT ORDER Extending Discovery Period and Modifying Scheduling Order. (Taylor, Scott) (Entered: 02/11/2011)
02/14/2011	28	CONSENT ORDER extending Discovery period to and including 3/18/2011, and the deadline for submission of summary judgment motions shall be 4/29/11. Signed by Judge Richard W. Story on 2/11/11. (cem) (Entered: 02/15/2011)
03/01/2011	29	NOTICE to Take Deposition of David Snavely filed by T-Mobile South, LLC (Attachments: # 1 Exhibit A - Snavely Subpoena) (Taylor, Scott) (Entered: 03/01/2011)
03/01/2011	30	Request for Leave of Absence for the following date(s): April 1, 2011, April 2, 2011, April 3, 2011, April 4, 2011, April 5, 2011, April 6, 2011, April 7, 2011, April 8, 2011, April 9, 2011, April 10, 2011, April 11, 2011 and April 12, 2011, by Regina Benton Reid. (Reid, Regina) (Entered: 03/01/2011)

DATE	NO.	PROCEEDINGS
03/07/2011		Case Reassigned to Judge Amy Totenberg. Judge Richard W. Story no longer assigned to case. NOTICE TO ALL COUNSEL OF RECORD: The Judge designation in the civil action number assigned to this case has been changed to 1:10-cv-1464-AT. Please make note of this change in order to facilitate the docketing of pleadings in this case. (cem) (Entered: 03/07/2011)
03/10/2011	31	NOTICE to Take Deposition of Todd VanCleve filed by City of Roswell, Georgia (Attachments: # 1 Exhibit A)(Reid, Regina) (Entered: 03/10/2011)
04/26/2011	32	NOTICE Of Filing by City of Roswell, Georgia (Attachments: # 1 R1-61)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	33	NOTICE Of Filing by City of Roswell, Georgia (Attachments: # 1 R62-65, # 2 R66-69, # 3 R70-73, # 4 R74-77, # 5 R78-82)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	34	NOTICE Of Filing by City of Roswell, Georgia (Attachments: # 1 R83-86)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	35	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R-87-90)(Reid, Regina) (Entered: 04/26/2011)

DATE	NO.	PROCEEDINGS
04/26/2011	36	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R91-93)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	37	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R94-95)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	38	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R96-97)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	39	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R98-99)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	40	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R100)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	41	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R101-154)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	42	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R155-157)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	43	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R158-162)(Reid, Regina) (Entered: 04/26/2011)

DATE	NO.	PROCEEDINGS
04/26/2011	44	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R163-167)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	45	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R168-172)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	46	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R179-180)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	47	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R181-182)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	48	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R183-184)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	49	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R185-186)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	50	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R187-188)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	51	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R189-190)(Reid, Regina) (Entered: 04/26/2011)

DATE	NO.	PROCEEDINGS
04/26/2011	52	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R191-192)(Reid, Regina) (Entered: 04/26/2011)
04/26/2011	53	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R193-194)(Reid, Regina) (Entered: 04/26/2011)
04/27/2011	54	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R195-196)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	55	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R197-198)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	56	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R199-200)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	57	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R201-202)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	58	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R203-204)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	59	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R205-206)(Reid, Regina) (Entered: 04/27/2011)

DATE	NO.	PROCEEDINGS
04/27/2011	60	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R207-208)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	61	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R209-210)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	62	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R210A-212)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	63	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R213-225)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	64	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R226-231)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	65	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R232-235)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	66	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R236-239)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	67	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R240-243)(Reid, Regina) (Entered: 04/27/2011)

DATE	NO.	PROCEEDINGS
04/27/2011	68	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R244-247)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	69	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R248-251)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	70	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R252-255)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	71	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R256-259)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	72	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R260-281)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	73	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R282-295)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	74	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R296-310)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	75	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R311-334)(Reid, Regina) (Entered: 04/27/2011)

DATE	NO.	PROCEEDINGS
04/27/2011	76	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R335-354)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	77	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R355-356)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	78	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R357-358)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	79	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R359-362)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	80	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R363-369)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	81	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R370-374)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	82	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R375-382)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	83	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R383-387)(Reid, Regina) (Entered: 04/27/2011)

DATE	NO.	PROCEEDINGS
04/27/2011	84	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R388-392)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	85	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R392-436)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	86	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R437-478)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	87	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R479-513)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	88	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R514-548)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	89	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R549-568)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	90	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R569-571)(Reid, Regina (Entered: 04/27/2011
04/27/2011	91	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R572-574)(Reid, Regina) (Entered: 04/27/2011)

DATE	NO.	PROCEEDINGS
04/27/2011	92	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R575-578)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	93	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R579-583)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	94	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R584-588)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	95	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R589-591)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	96	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R592-594)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	97	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R595-622)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	98	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R623-662)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	99	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R663-700)(Reid, Regina) (Entered: 04/27/2011)

DATE	NO.	PROCEEDINGS
04/27/2011	100	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R701-728)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	101	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R729-769)(Reid, Regina) (Entered: 04/27/2011)
04/27/2011	102	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 R770-773)(Reid, Regina) (Entered: 04/27/2011)
04/29/2011	103	STIPULATION of Dismissal *of Count III of the Complaint* by City of Roswell, Georgia, T-Mobile South, LLC. (Taylor, Scott) (Entered: 04/29/2011)
04/29/2011	104	MOTION for Summary Judgment with Brief In Support by City of Roswell, Georgia. (Attachments: # 1 Brief, # 2 Statement of Material Facts)(Reid, Regina) --Please refer to http://www.gand.uscourts.gov to obtain the Notice to Respond to Summary Judgment Motion form contained on the Court's website.-- (Entered: 04/29/2011)
04/29/2011	105	MOTION to Stay with Brief In Support by City of Roswell, Georgia. (Reid, Regina) (Entered: 04/29/2011)

DATE	NO.	PROCEEDINGS
04/29/2011	106	MOTION for Summary Judgment with Brief In Support by T-Mobile South, LLC. (Attachments: # 1 Brief, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Statement of Material Facts, # Z Exhibit 1, # 8 Attachment A Pt. 1, # 2 Attachment A Pt. 2, #10 Attachment A Pt. 3, # 11 Attachment A Pt. 4, # 12 Attachment B, # 13 Attachment C Pt. 1, # 14 Attachment C Pt. 2, # 15 Attachment D Pt. 1, # 16 Attachment D Pt. 2, # 17 Attachment E)(Taylor, Scott) -- Please refer to http://www.gand.uscourts.gov to obtain the Notice to Respond to Summary Judgment Motion form contained on the Court's website.-- (Entered: 04/29/2011)
05/01/2011	107	Withdrawal of Motion 105 MOTION to Stay filed by City of Roswell, Georgia filed by City of Roswell, Georgia. (Reid, Regina) (Entered: 05/01/2011)
05/01/2011	108	NOTICE Of Filing by City of Roswell, Georgia *Original Record* (Attachments: # 1 Exhibit Ex 173-178)(Reid, Regina) (Entered: 05/01/2011)
05/02/2011		Submission of 103 Stipulation of Dismissal, submitted to District

DATE	NO.	PROCEEDINGS
		Judge Amy Totenberg. (tcc) (Entered: 05/02/2011)
05/02/2011		Clerk's Entry of Dismissal APPROVING 103 Stipulation of Dismissal of Count III of the complaint pursuant to Fed.R.Civ.P.41(a)(1)(ii). (acm) (Entered: 05/02/2011)
05/23/2011	109	RESPONSE re 104 MOTION for Summary Judgment filed by T-Mobile South, LLC. (Taylor, Scott) (Entered: 05/23/2011)
05/23/2011	110	NOTICE Of Filing Exhibits "A" and 'B" by T-Mobile South, LLC re 109 Response to Motion (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Taylor, Scott) (Entered: 05/23/2011)
05/23/2011	111	Response to Statement of Material Facts re 104 MOTION for Summary Judgment filed by T-Mobile South, LLC. (Taylor, Scott) (Entered: 05/23/2011)
05/23/2011	112	RESPONSE in Opposition re 106 MOTION for Summary Judgment filed by City of Roswell, Georgia. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Reid, Regina) (Entered: 05/23/2011)
05/23/2011	113	Response to Statement of Material Facts re 106 MOTION for Summary Judgment filed by City of Roswell,

DATE	NO.	PROCEEDINGS
		Georgia. (Reid, Regina) (Entered: 05/23/2011)
06/07/2011	114	NOTICE Of Filing by City of Roswell, Georgia of *Original Deposition of Todd VanCleve* (Reid, Regina) (Entered: 06/07/2011)
06/07/2011	115	Request to File Original Discovery *of David Snavely* by City of Roswell, Georgia. (Reid, Regina) (Entered: 06/07/2011)
06/08/2011	116	DEPOSITION of Todd Vancleve taken on 3/22/2011 by City of Roswell, Georgia. (tcc) (Additional attachment(s) added on 6/20/2012: # 1 Deposition, # 2 Exhibits) (fem). (Entered: 06/09/2011)
06/09/2011	117	REPLY BRIEF re 104 MOTION for Summary Judgment filed by City of Roswell, Georgia. (Reid, Regina) (Entered: 06/09/2011)
06/09/2011	118	REPLY BRIEF re 106 MOTION for Summary Judgment filed by T-Mobile South, LLC. (Attachments: # 1 Reply Brief – Exhibit 1, # 2 Plaintiff's Response to Defendant's Statement of Disputed Facts)(Barr, Jonathan) (Entered: 06/09/2011)
06/10/2011	119	NOTICE Of Filing Original Deposition Transcript and Errata Sheet of David Snavely by T-Mobile South, LLC (Barr, Jonathan) (Entered: 06/10/2011)

DATE	NO.	PROCEEDINGS
06/10/2011	120	DEPOSITION of David Snavely taken on 3/23/2011 by T-Mobile South, LLC.(tcc) (Additional attachment(s) added on 6/20/2012: # 1 Deposition, # 2 Errata Sheet) (fern). (Additional attachment(s) added on 7/26/2012: # 3 Exhibits) (fern). (Additional attachment(s) added on 7/26/2012: # 4 Exhibits) (fern). (Additional attachment(s) added on 7/26/2012: # 5 Exh - part 1, # 6 Exh - Part 2, # 7 Exh - part 3, # 8 Exh - part 4, # 9 Exh - Part 5, # 10 Exh - Part 6) (fern). (Additional attachment(s) added on 7/26/2012: # 11 Exh – part 1, # 12 Exh - part 2, # 13 Exh- part 3, # 14 Exh - Part 4, # 15 Exh - Part 5, # 16 Exh - Part 6) (fern). (Additional attachment(s) added on 7/26/2012: # 17 Exhibits - 1, # 18 Exhibits 2, # 19 Exhibits 3, # 20 Exhibits 4, # 21 Exhibits 5, # 22 Exhibits 6, # 23 Exhibits 7, # 24 Exhibits 8) (fem). (Entered: 06/13/2011)
06/13/2011		Submission of 106 MOTION for Summary Judgment, 104 MOTION for Summary Judgment, submitted to District Judge Amy Totenberg. (tcc) (Entered: 06/13/2011)
12/19/2011	121	Guidelines to Parties and Counsel in Cases Proceeding Before the

DATE	NO.	PROCEEDINGS
		Honorable Amy Totenberg. Signed by Judge Amy Totenberg on 12/19/2011. (rvb) (Entered: 12/20/2011)
02/21/2012		MINUTE ORDER. The parties are directed to collaborate and make arrangements to file with the Court the video relating to the balloon test conducted, as reflected in the transcript of the City Council hearing at pages 27-28. The video should be filed no later than February 24, 2012. Entered by Judge Amy Totenberg on 2/21/2012. (acm) (Entered: 02/21/2012)
03/01/2012	122	Request for Leave of Absence for the following date(s): 3/30/12, 4/3/12, 4/4/12, 4/5/12, 4/6/12, 4/9/12, by Regina Benton Reid. (Reid, Regina) (Entered: 03/01/2012)
03/19/2012	123	Minute Entry for proceedings held before Judge Amy Totenberg: Telephone Conference held on 3/19/2012. The conference will resume on Tuesday, March 27 at 10:30 AM. (Court Reporter Elise Evans)(rvb) (Entered: 03/19/2012)
03/27/2012	124	ORDER denying Defendant's 104 Motion for Summary Judgment and granting Plaintiffs 106 Motion for Summary Judgment. The City of Roswell is ORDERED to grant T-Mobile's application for a permit to

DATE	NO.	PROCEEDINGS
		construct a 108-foot tall monopine telecommunications tower on the 2.8 acre parcel of land adjacent to 1060 Lake Charles Drive. Signed by Judge Amy Totenberg on 03/27/2012. (rvb) (Entered: 03/27/2012)
03/27/2012	125	CLERK'S JUDGMENT entered in favor of plaintiff and against defendant. (rvb) -- Please refer to http://www.ca11.uscourts.gov to obtain an appeals jurisdiction checklist -- (Entered: 03/27/2012)
03/27/2012		Civil Case Terminated. (rvb) (Entered: 03/27/2012)
03/27/2012	126	Minute Entry for proceedings held before Judge Amy Totenberg: Telephone Conference held on 3/27/2012. (Court Reporter Montrell Vann)(acm) (Entered: 03/30/2012)
04/24/2012	127	NOTICE OF APPEAL as to 124 Order on Motion for Summary Judgment,,, by City of Roswell, Georgia. Filing fee $ 455, receipt number 113E-3895281. Transcript Order Form due on 5/8/2012 (Reid, Regina) (Entered: 04/24/2012)
04/24/2012	128	MOTION to Stay *Permanent Injunction Pending Appeal* with Brief In Support by City of Roswell, Georgia. (Attachments: # 1 Brief In Support of Motion to Stay Permanent Injunction Pending

DATE	NO.	PROCEEDINGS
		Appeal)(Reid, Regina) (Entered: 04/24/2012)
04/25/2012	129	Transmission of Certified Copy of Notice of Appeal, Judgment, Order and Docket Sheet to US Court of Appeals re 127 Notice of Appeal (fern) (Entered: 04/25/2012)
05/01/2012	130	USCA Acknowledgment of 127 Notice of Appeal filed by City of Roswell, Georgia. Case Appealed to USCA Case Number 12-12250-B (fem) (Entered: 05/01/2012)
05/03/2012	131	TRANSCRIPT ORDER FORM re 127 Notice of Appeal (Reid, Regina)No transcript needed for appeal purposes. Modified on 5/3/2012 (km). (Entered: 05/03/2012)
05/04/2012	132	PROPOSED CONSENT ORDER Consent Order re: 128 MOTION to Stay *Permanent Injunction Pending Appeal*. (Taylor, Scott) (Entered: 05/04/2012)
05/04/2012	133	CONSENT ORDER regarding the parties agreement that Plaintiff will neither seek issuance of the permit for the tower that is the subject of this litigation, nor construct the tower until either the Defendant withdraws its appeal, or all litigation before the United States Court of Appeals for the Eleventh Circuit is concluded with a disposition

DATE	NO.	PROCEEDINGS
		requiring issuance of the permit that is the subject of the litigation; The parties agree to use reasonable efforts to cooperate to seek expedited briefing and consideration of the Defendant's appeal. The Court denies as moot 128 Motion to Stay Permanent Injunction Pending Appeal. Signed by Judge Amy Totenberg on 05/04/2012. (rvb) (Entered: 05/04/2012)
06/20/2012		Pursuant to F.RA.P.11(c), the Clerk certifies that the record is complete for purposes of this appeal, 127 Notice of Appeal. Case Appealed to USCA Case Number 12¬12250-B. The entire record on appeal is available electronically. (fem) (Entered: 06/20/2012)
10/01/2013	134	USCA Opinion received (REVERSE AND REMANDED) re: 127 Notice of Appeal filed by City of Roswell, Georgia. In accordance with FRAP 41(b), the USCA mandate will issue at a later date. Case Appealed to usca Case Number 12-12250-BB. (fem) (Entered: 10/02/2013)
11/07/2013	135	Certified copy of JUDGMENT of USCA REVERSING and REMANDING to the District Court for further action of the granting of summary judgment re: 127 Notice of Appeal filed by City of Roswell,

DATE	NO.	PROCEEDINGS
		Georgia. Case Appealed to USCA, 11th Circuit Case Number 12-12250-BB. (bdb) (Entered: 11/07/2013)
11/07/2013		Submission of 135 USCA Judgment and 134 USCA Opinion. Submitted to District Judge Amy Totenberg. (bdb) (Entered: 11/07/2013)
11/08/2013	136	ORDER making the USCA mandate the judgment of this Court re 127 Notice of Appeal Case Appealed to USCA - 11th Circuit Case Number 12-12250. Signed by Judge Amy Totenberg on 11/7/13. (hfm) (Entered: 11/08/2013)
12/12/2013	137	PROPOSED CONSENT ORDER STAYING ACTION. (Taylor, Scott) (Entered: 12/12/2013)
12/19/2013	138	ORDER: The parties agree that this matter shall be stayed until the Supreme Court of the United States rules on the Petition. Should the Supreme Court grant the Petition, the stay entered in this Order shall automatically be extended pending the decision of the Supreme Court. During this period of stay, this action shall be ADMINISTRATIVELY CLOSED. Signed by Judge Amy Totenberg on 12/19/13. (hfm) (Entered: 12/19/2013)
12/19/2013		Civil Case Terminated. (hfm) (Entered: 12/19/2013)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket No. 12-12250

T-MOBILE SOUTH, LLC

v.

CITY OF ROSWELL, GEORGIA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
04/26/2012	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant City of Roswell, Georgia on 04/24/2012. Fee Status: Fee Paid. USDC motion pending: Motion to Stay Permanent Injunction Pending Appeal DE #128 filed on 04/24/2012.
05/02/2012	APPEARANCE of Counsel Form filed by T. Scott Thompson for T-Mobile South, LLC (ECF: Thomas Thompson)
05/02/2012	APPEARANCE of Counsel Form filed by Daniel P. Reing for T-Mobile South, LLC (ECF: Daniel Reing)
05/03/2012	Added Attorney(s) Thomas Scott Thompson for party(s) Appellee T-Mobile South, LLC, in case 12-12250.
05/03/2012	E-filed Appearance of Counsel filed by Attorney Thomas Scott Thompson for Appellee T-Mobile South, LLC in 12-12250 processed.

DATE	PROCEEDINGS
05/03/2012	Added Attorney(s) Daniel Peter Reing for party(s) Appellee T-Mobile South, LLC, in case 12-12250.
05/03/2012	E-filed Appearance of Counsel filed by Attorney Daniel Peter Reing for Appellee T-Mobile South, LLC in 12-12250 processed.
05/03/2012	APPEARANCE of Counsel Form filed by Regina Benton Reid for City of Roswell, Georgia. (ECF: Regina Reid)
05/03/2012	APPEARANCE of Counsel Form filed by Richard A. Carothers for City of Roswell, Georgia. (ECF: Richard Carothers)
05/03/2012	E-filed Appearance of Counsel filed by Attorney Regina Benton Reid for Appellant City of Roswell, Georgia in 12-12250 processed.
05/03/2012	E-filed Appearance of Counsel filed by Attorney Richard A. Carothers for Appellant City of Roswell, Georgia in 12-12250 processed.
05/03/2012	TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Regina Benton Reid for Appellant City of Roswell, Georgia. No hearings. (ECF: Regina Reid)
05/04/2012	TRANSCRIPT INFORMATION form filed by Attorney Regina Benton Reid for Appellant City of Roswell, Georgia. No hearings.

DATE	PROCEEDINGS
05/08/2012	Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant City of Roswell, Georgia. (ECF: Regina Reid)
05/08/2012	Civil Appeal Statement filed by Attorney Regina Benton Reid for Appellant City of Roswell, Georgia. (ECF: Regina Reid)
05/15/2012	USDC order: Consent Order regarding stay DE #128 - motion is moot. as to Appellant City of Roswell, Georgia was filed on 05/04/2012. Docket Entry 133.
05/17/2012	Appellee's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee T-Mobile South, LLC. (ECF: Thomas Thompson)
05/29/2012	Briefing Notice issued to Appellant City of Roswell, Georgia. The appellant brief and record excerpts are due on or before 06/25/2012.
06/22/2012	Appellant's brief filed by City of Roswell, Georgia. Service date: 06/22/2012 [12-12250] Attorney for Appellee: Reing - US mail; Attorney for Appellee: Thompson - US mail. (ECF: Regina Reid)
06/22/2012	Modified brief received on 07/25/2012 from Appellant City of Roswell, Georgia. All deficiencies have been corrected.

DATE	PROCEEDINGS
06/22/2012	Modified record excerpts (4 Volumes) received on 07/25/2012 from Appellant City of Roswell, Georgia. All deficiencies have been corrected.
06/25/2012	Received paper copies of EBrief filed by Appellant City of Roswell, Georgia.
06/25/2012	Expanded Record Excerpts filed by Attorney Regina Benton Reid for Appellant City of Roswell, Georgia. Deficiencies: incomplete Index, no Table of Record References, numbers on indexing tabs do not correspond to the document numbers assigned by the district court, indexing tabs not affixed to all documents in the excerpts, missing portions of the record referenced in the brief and portions of the record required in an appeal from a grant of summary judgement. Service date: 06/22/2012 US mail - Attorneys for Appellee: Reing, Thompson.
07/16/2012	Notice of deficient Appellant's Brief filed by Attorney Regina Benton Reid for Appellant City of Roswell, Georgia. Deficiencies: no Table of Record References, references to the record do not conform to 11th Cir. R. 28-5.
07/16/2012	Notice of deficient Expanded Record Excerpts filed by Attorney Regina Benton Reid for Appellant City of Roswell, Georgia. Deficiencies: incomplete Index, no Table of Record

DATE	PROCEEDINGS
	References, numbers on indexing tabs do not correspond to the document numbers assigned by the district court, indexing tabs not affixed to all documents in the excerpts, missing portions of the record referenced in the brief and portions of the record required in an appeal from a grant of summary judgement.
07/25/2012	Corrected Appellant's Brief filed by Appellant City of Roswell, Georgia. Service date: 06/22/2012 US mail Attorney for Appellees: Reing, Thompson; email - Attorney for Appellees: Reing, Thompson. (ECF: Regina Reid)
07/26/2012	Appellee's Brief filed by Appellee T-Mobile South, LLC. Service date: 07/26/2012 US mail - Attorney for Appellants: Carothers, Reid; email - Attorney for Appellants: Carothers, Reid. (ECF: Thomas Thompson)
07/27/2012	Received paper copies of EBrief filed by Appellee T-Mobile South, LLC.
07/27/2012	Supplemental Expanded Record Excerpts filed by Attorney Thomas Scott Thompson for Appellee T-Mobile South, LLC. Service date: 07/26/2012 email - Attorney for Appellants: Carothers, Reid; Attorney for Appellees: Reing, Thompson; US mail - Attorney for Appellees: Barr, Taylor.

DATE	PROCEEDINGS
08/09/2012	Reply Brief filed by Appellant City of Roswell, Georgia. Service date: 08/09/2012 US mail - Attorney for Appellees: Reing, Thompson; email - Attorney for Appellees: Reing, Thompson. (ECF: Regina Reid)
08/10/2012	Received paper copies of EBrief filed by Appellant City of Roswell, Georgia.
08/22/2012	Assigned to tentative calendar number 10 in Atlanta during the week of January 7, 2013. [12-10709, 12-12250, 11-15778]
09/19/2012	Assigned to tentative calendar number 13 in Atlanta during the week of January 28, 2013.
11/02/2012	Oral argument scheduled. Argument Date: Tuesday, 01/29/2013 Argument Location: Atlanta Courtroom: Atlanta 339.
01/29/2013	Oral argument held. Oral Argument participants were Regina Benton Reid for Appellant City of Roswell, Georgia and Thomas Scott Thompson for Appellee T-Mobile South, LLC.
05/28/2013	Appellee's AMENDED Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee T-Mobile South, LLC. (ECF: Thomas Thompson)

DATE	PROCEEDINGS
09/16/2013	Counsel is directed to file supplemental letter briefs by 9/23/13 2pm (10 pages).
09/16/2013	Public Communication: Parties and Counsel to file supplemental letter briefs by 9/23/13 2pm, 10 pages.
09/23/2013	Supplemental Appellee's Letter Brief filed by Appellee T-Mobile South, LLC. Service date: 09/23/2013 email - Attorney for Appellants: Carothers, Reid. (ECF: Thomas Thompson)
09/23/2013	Supplemental Appellant's Letter Brief filed by Appellant City of Roswell, Georgia. Service date: 09/23/2013 US mail - Attorney for Appellees: Barr, Taylor; email - Attorney for Appellees: Reing, Thompson. (ECF: Regina Reid)
10/01/2013	Judgment entered as to Appellant City of Roswell, Georgia.
10/01/2013	Opinion issued by court as to Appellant City of Roswell, Georgia. Decision: Reversed and Remanded. Opinion type: Published. Opinion method: Signed.
11/07/2013	Mandate issued as to Appellant City of Roswell, Georgia.
12/26/2013	Extension for filing certiorari GRANTED by U.S. Supreme Court as to Appellee T-Mobile South, LLC. to 2/13/14

DATE	PROCEEDINGS
02/18/2014	Notice of Writ of Certiorari filed as to Appellee T-Mobile South, LLC. SC# 13-975.
05/05/2014	Writ of Certiorari filed as to Appellee T-Mobile South, LLC is GRANTED. The motion of Competitive Carriers Association for leave to file a brief as amicus curiae is granted. SC# 13-975.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed May 13, 2010]

Civil Action File 1:10-cv-01464

T-MOBILE SOUTH LLC,
Plaintiff,

v.

CITY OF ROSWELL, GEORGIA,
Defendant.

VERIFIED COMPLAINT

NOW COMES Plaintiff T-Mobile South LLC ("Plaintiff"), by and through its undersigned counsel of record, and shows this Honorable Court as follows:

INTRODUCTION

1.

This is an appeal and action for injunctive relief, brought pursuant to the Telecommunications Act of 1996, Pub. L. 104-104 § 704, 110 Stat. 56 (Codified in 47 U.S.C.A. § 332(c)) (the "Telecommunications Act"). Defendant's denial of Plaintiff's application for a permit to build and operate a wireless facility or "cell site" on property adjacent to 1060 Lake Charles Drive, Roswell, Georgia 30075, violates Plaintiff's rights under the Telecommunications Act and the Constitution of the State of Georgia. Further, Defendant's unlawful acts entitle Plaintiff to

injunctive relief compelling Defendant to grant Plaintiff a permit for construction and operation of a cell site at the designated location.

JURISDICTION AND VENUE

2.

This Court has jurisdiction over this matter pursuant to the Telecommunications Act (42 U.S.C. § 332(c)), 28 U.S.C. § 1331 and principles of pendent jurisdiction. Venue is proper in this Court under the Telecommunications Act and 28 U.S.C. § 1391 because the proposed structure site is located within this District. The Defendant is a duly organized and authorized governing body within this District and the acts described herein occurred within this District.

PARTIES

3.

Plaintiff is a Delaware limited liability company with its principal place of business in Bellevue, Washington laintiff is qualified to do business in the State of Georgia, maintains an office in Georgia, is registered to do business under the name "T-Mobile" and operates a wireless network providing personal wireless services and advanced wireless services as defined by federal law in the State of Georgia.

4.

Defendant Roswell, Georgia (the "City"), is a political subdivision in the State of Georgia and is subject to the jurisdiction and venue of this Court. The City may be served by serving a copy of the Complaint upon Jere Wood, Mayor, City of Roswell, Georgia, 38 Hill Street, Roswell, Georgia 30075.

FACTS

5.

Wireless telephone service is essential to public safety and convenience, and providing dependable coverage is remarkably important to the safety of both residential and mobile users of wireless services. Since Congress amended the Telecommunications Act in 1996, there has been a sea change in the manner in which Americans use wireless services. According to the FCC, nearly everyone carries a wireless device. See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services (2008) ¶ 244, p. 107. From 1996 to 2009, the number of wireless telephone users increased more than fivefold—from 44 million to more than 276 million wireless subscribers. There are now more wireless subscriptions than landline telephone subscriptions in the United States. Approximately 80% of all Americans, and over 90% of those in the 20 to 49 age range, own wireless phones. For many Americans, wireless services have become an indispensable replacement for traditional landline telephones.

6.

In 2003, the number of "wireless-only" households was three percent. According to a survey recently released by the Centers for Disease Control and Prevention, by the end of 2008 the number of "wireless-only" households had increased to 20%—more than six times greater than it had been in 2003. This trend is even more prevalent among younger adults, where over one-third of all adults aged 19-24 live in "wireless-only" households and nearly 40% of households with adults aged 25-29. Americans are

opting increasingly to use their cell phones over their landline telephones. From 1996 to 2004, Americans more than quadrupled their time spent talking on their cell phones, while markedly reducing the number of long-distance and local calls made over conventional landlines.

7.

For Americans living in wireless-only homes and those outside of their homes, cell phones are often their only lifeline in emergencies. Since 1995, the number of 911 calls made by people using wireless phones has more than quintupled. Public safety agencies estimate that more than 290,000 emergency 911 calls are placed from cell phones every day.

8.

The vast decrease in the use of traditional land lines by households and the concurrent sizable increase in the use of wireless phones within households as their predominant means of telecommunications have significantly affected wireless services providers. The ability to provide reliable in home wireless coverage is critical to the ability of wireless service providers to remain competitive in one of America's most competitive industries.

9.

Plaintiff exercises rights under a license authorized by the Federal Communications Commission (the "FCC") to provide Commercial Mobile Radio Services, as defined in federal law, within Plaintiff's designated frequency spectrum assigned by the FCC in 1.7, 1.9 and 2.1 gigahertz bands in the licensed area of Metropolitan Atlanta, Georgia, including Roswell, Georgia.

10.

Pursuant to FCC license, Plaintiff is required to provide wireless telephone services to its customers within the licensed area. Plaintiff is currently engaged in expanding its coverage within boundaries established by the FCC rules and regulations, and complies with all tower requirements by the Federal Aviation Administration (the "FAA"), and utilizes equipment that has been approved by the FCC and the FAA.

11.

Plaintiff is building out its infrastructure in the area covered by the FCC license, including Roswell, Georgia, in order to establish its network and provide high quality service in the area.

12.

Pursuant to the FCC license, Plaintiff is mandated to ensure that its wireless telephone signal strength is sufficient to provide proper reception and communication within the licensed area. As a result, Plaintiff needs a network of cell sites throughout the licensed area. This overlapping grid pattern of cell sites enables a customer's call to be handed off from one cell site to another as the customer moves through the area. If Plaintiff is prevented from installing a cell site within a specific geographic area, then T-Mobile is unable to provide service to customers within that area.

13.

Plaintiff's engineers develop propagation studies by using sophisticated radio frequency propagation prediction software that accurately identifies where new cell sites need to be located in order to provide reliable coverage within an area. These propagation

studies take into account such factors as the topography of the land, existing tall structures, vegetation, the coverage boundaries of neighboring cells and other factors to predict the wireless coverage that can be achieved over a defined geographic area if the antennas for a new cell site are located in a certain area and at a particular height above ground level.

14.

Plaintiff's coverage must be sufficient to make it competitive in the marketplace in order to fulfill the competitive mandates and purposes of the TCA. The coverage level must be more than a minimal level of coverage, particularly because customers use their wireless devices with increasing frequency in their homes and businesses as replacements for traditional "land line" phones.

15.

Plaintiff's need for a network of cell sites does not mean that it requires, or even desires, to place new towers or structures throughout the licensed area. To the contrary, Plaintiff is committed to co-location with other mobile telecommunications providers on existing towers or locating on other structures, whenever possible. Indeed, 16 of 19 (84%) of Plaintiff's antenna facilities in the City of Roswell are co-located on pre-existing towers or structures.

16.

Plaintiff has investigated various sites for its cell site to avoid coverage gaps and service quality problems in Roswell, Georgia. Plaintiff's engineers established a "search ring" within which a cell site must be located in order to achieve Plaintiff's coverage and network quality goals.

17.

To address certain of its coverage issues, Plaintiff examined the City of Roswell Master Wireless Facilities Siting Plan (the "Siting Plan"), adopted by the City in July 2003. The Siting Plan identifies what are essentially "preferred locations" for wireless facilities in the City, and provides for location of wireless facilities on property owned, leased or controlled by the City. Plaintiff identified such a "preferred location", known as Roswell Fire Station No. 3, that would enable Plaintiff to construct a wireless facility that would aid in addressing certain of Plaintiff's coverage issues in the City. Because Fire Station No. 3 appeared on the Master Siting Plan, Plaintiff would be able to construct a wireless facility at Fire Station No. 3 by entering into a lease agreement with the City.

18.

In October 2008, Plaintiff approached the City about a lease to locate a wireless facility at Fire Station No. 3.

19.

Before the City would enter into a lease with Plaintiff, Mayor Jere Wood directed the City Planning Staff to obtain "neighborhood input" on the proposed facility, despite the fact that Fire Station No. 3 had already been identified as a preferred location on the Siting Plan.

20.

At the specially-called neighborhood meeting that followed, area residents appeared to protest the proposed facility, arguing that it would result in negative aesthetics, adverse health effects and that it

would purportedly diminish property values. The area residents demanded that Fire Station No. 3 be removed from the Siting Plan. At the time, Mayor Wood noted, correctly, that "the issue here is that there are no commercial sites anywhere in the area in which [Plaintiff] need[s] the tower."

21.

Despite the recognized need for the facility, the fact that there were no commercial sites available, and the fact that Fire Station No. 3 was an approved site on the Siting Plan, the City bowed to political pressure, ignored its own ordinance and Siting Plan, and refused to enter into a lease for the site at Fire Station No. 3.

22.

Further, the City then removed Fire Station No. 3 from the Siting Plan via an amendment to the City Code.

23.

Following the events surrounding the Fire Station No. 3 site, Plaintiff "re-worked" the search area to attempt to find an alternative location. Plaintiff's engineers have determined that a cell site is needed at or near a parcel of property located at 1067 Lake Charles Drive, Roswell, Georgia 30075 (the "Property"), which is owned by Robert Shearer. The Property is a 2.8 acre parcel. Location of a cell site upon the Property would provide coverage in an area where coverage currently either does not exist, is extremely weak, or is below the level of coverage necessary for Plaintiff to be competitive in the marketplace. Plaintiff's engineers have determined that a co-location is not possible in this case because there is no existing tower or other structure which met

engineering specifications in or near the search area established for the proposed structure.

24.

Therefore, Plaintiff negotiated a lease with the Property owner, who agreed to lease a parcel of the Property, with an access easement, to Plaintiff for purposes of locating the antenna on the Property.

25.

The Property is located within the City of Roswell and is zoned "E-2" (Residential). A true and correct copy of a diagram depicting the Property and the location of the proposed structure is attached as part of Exhibit "1". The Property is more fully described in the legal description a true and correct copy of which is attached hereto as Exhibit "2".

26.

Telecommunications towers in the "E-2" classification are permitted following approval by the Roswell City Council, pursuant to the City's Standards for Wireless Communications Facilities (the "Ordinance").

27.

On or about February 2, 2010, Plaintiff filed an application seeking permission to construct a 108 ft. stealth "monopine" telecommunications tower on the Property. A monopine tower is a telecommunications tower that is designed to resemble a pine tree. The application ("Application") was accepted by the City. A true and correct copy of the Application is attached hereto as Exhibit "3".

28.

The Application met all requirements for obtaining a permit for a telecommunications tower as set forth in the Ordinance. A true and correct copy of the Ordinance which addresses telecommunications towers, and the issuance of permits for telecommunications towers, is attached hereto as Exhibit "4".

29.

The Ordinance provides guidelines and requirements for telecommunications towers and antennas, and sets forth the requirements for a permit for the location and construction of telecommunication towers.

30.

The Ordinance requires that a scaled site plan of the proposed wireless facility including elevations, accessory structures, topography, parking, proximity to adjacent roadways, proposed means of access, and setbacks for property lines be included with the Application. Ordinance, Section 21.2.4(c)(1). Plaintiff's Application included this requested information.

31.

The Ordinance requires that a legal description of the parent tract and leased parcel be included with the Application. Ordinance, Section 21.2.4(c)(2). Plaintiff's Application complies with this requirement.

32.

The Ordinance requires an applicant to provide a definition of the area of coverage and radio frequency goals to be served by the proposed wireless facility and

to describe the nature of the need for the proposed facility. Ordinance, Section 21.2.4(c)(3). Plaintiff's Application included this requested information.

33.

The Ordinance requires an applicant to identify the setback distance between the proposed facility and the nearest residential unit or residentially-used structure. Ordinance, Section 21.2.4(c)(4). Plaintiff's Application complies with this requirement.

34.

Plaintiff's Application complied with the landscaping requirement contained in the Ordinance, by incorporating a landscaping plan to shield the ancillary facilities at the base of the tower. *See* Ordinance, Section 21.2.4(c)(6). In addition, the property is wooded, shielding the proposed site from adjacent properties.

35.

Pursuant to the requirements set forth by the FAA, the telecommunications tower provided for in Plaintiff's Application would not be lighted.

36.

Plaintiff's Application met or exceeded standards and regulations of the FAA, the FCC and all other agencies of the federal government with authority to regulate antennas and towers.

37.

Plaintiff's proposed tower and security fencing, when built, would meet requirements of all building codes and safety standards regarding the structural integrity and construction of the proposed tower.

38.

Plaintiff demonstrated that no existing antenna, tower, or structure could accommodate Plaintiff's proposed antenna.

39.

The tower proposed by Plaintiff met all setback and separation requirements contained in the Ordinance.

40.

The nature of uses on adjacent and nearby properties is primarily residential. The Property is undeveloped, and is heavily wooded. The Property owner's residence is located on an adjacent parcel. The Property is in a residentially-zoned area which completed its growth and development several years ago. The Property has mature tree coverage and vegetation. The Property is bounded on all sides by property zoned "E-2", including the Property owner's parcel to the west. Beyond the residentially-zoned properties to the east is Lake Charles Drive.

41.

Section 21.2.4(a) of the Ordinance provides factors to be considered by the Defendant in determining whether to issue a permit for a wireless telecommunications facility. All of the factors were addressed by Plaintiff, and all of the requirements of the Ordinance were met or exceeded.

42.

Plaintiff submitted revised site plans reflecting certain changes to the planned development of the site. A true and correct copy of the revised site plan is attached hereto as Exhibit "5".

43.

Plaintiff also submitted a letter to the City suggesting that the City reconsider its decision on the Fire Station No. 3 site. A true and correct copy of the letter is attached hereto as Exhibit "6". The City never responded to this letter.

44.

Plaintiff's Application was reviewed by the Defendant's Planning and Zoning Staff who are employed by the Defendant to evaluate such applications (the "Planning Staff").

45.

The Planning Staff applied the Defendant's standards adopted for issuance of wireless telecommunications facility permits to the Application, and determined that Plaintiff complied with all objective standards set out in the Ordinance. A true and correct copy of the Planning Staff's analysis is attached hereto as Exhibit "7".

46.

The Planning Staff recommended a finding that the proposed monopine structure is compatible with the natural setting and surrounding structures in the area.

47.

The Planning Staff noted as follows:

> Should the Mayor and City Council approve the application for a mono-pine alternative tower structure, the staff would recommend the application be approved with the following conditions:

47

1. The applicant/developer shall construct the mono-pine structure not to exceed 108 feet, located 120 feet east of the west property line and in conformance with the plans submitted to the City of Roswell Community Development Department stamped received "March 24, 2010."

2. The applicant/developer, T-Mobile shall construct a black vinyl fence with black screening so the facility equipment cannot be seen through the fence. The type of fencing shall be approved by the Roswell Design Review Board.

3. The applicant/developer, T-Mobile shall install thirty-three (33) evergreen trees around the lease area to screen the view of the structure and equipment facilities from the residential homes located to the east of the property. A variety of evergreen trees and the placement of the trees shall be approved the City Arborist and the Roswell Design Review Board.

See Exhibit "7", pg. 4. All of the conditions were acceptable to T-Mobile except the relocation of the proposed tower to the location recommended by the Staff, as the Property owner was not agreeable to the move.

48.

Further, although it was not obligated to do so but in an effort to be cooperative, Plaintiff submitted

responses to a lengthy list of questions propounded by a citizens group via the City's Planning Staff. A true and correct copy of Plaintiff's responses are attached hereto as Exhibit "8".

49.

The Defendant heard Plaintiff's Application on April 12, 2010. In the presentation on Plaintiff's Application, Plaintiff reiterated that its Application met all the requirements of the Ordinance. A true and correct copy of the transcript of the April 12, 2010 hearing is attached hereto as Exhibit "9".

50.

Plaintiff demonstrated to Defendant that, as noted by the Planning Staff, it met the specified standards and criteria for the grant of a permit for the location of the tower on the subject Property.

51.

Plaintiff presented evidence that the location for the proposed structure was appropriate and would serve the residents and businesses of the City. Plaintiff demonstrated that the proposed structure was part of a plan for extending Plaintiff's network, and coverage, within Roswell, Georgia.

52.

Plaintiff's design will not disturb the existing vegetation on the Property.

53.

Plaintiff presented evidence that the cell site consists of cabinets for its radio equipment and the tower which would support its antennas. This cell site would be an unmanned site that would require only

one or two visits per month to perform routine maintenance.

54.

Plaintiff presented evidence that there was no existing tower or alternative structure located in the search area that would accommodate its cell site and coverage needs. Further, Plaintiff presented evidence that the structure would be designed to allow for co-location which would assist in minimizing the number of additional towers or structures needed in the area.

55.

Plaintiff presented evidence that there is no technically suitable space on an existing tower site within or near its established search area.

56.

Plaintiff presented a letter from a radiofrequency engineer regarding the proposed tower and Plaintiff presented radiofrequency propagation maps demonstrating the poor and/or non-existent coverage in the area, further demonstrating the need for the proposed tower. See copies of January 26, 2010 letter from radiofrequency engineer and copies of radiofrequency propagation maps presented to Defendant, attached hereto for as Exhibit "10". The radiofrequency engineer was also present at the April 12, 2010 hearing. She addressed numerous technical and system design questions posed by the Defendant and by various citizens. *See* Exhibit "9" at pgs. 16-21 and 92-97.

57.

Plaintiff also presented a diagram showing the location of the proposed tower and the zoning of all of the parcels in the search ring and in the surrounding

area. A true and correct copy of the diagram is attached hereto as Exhibit "11". In the Application and at the April 12, 2010 hearing, Plaintiff's representative described the search process. See Exhibit "3" at pgs. 4-5 and Exhibit "9" at pgs. 12-16, 83-87. The site selection process is also discussed in Exhibit "10" at pgs. 2-3.

58.

Plaintiff's representative discussed the fact that there are no other properties within the search ring that, because of restrictions under the Ordinance, are available for the proposed tower.

59.

Plaintiff presented evidence that it would construct and maintain the structure in compliance with local, state and federal requirements and applicable standards published by the Electronic Industries Association.

60.

The site plan proposed by Plaintiff provides for a security fence with an anti-climbing device and a locked gate entrance.

61.

Plaintiff presented evidence that the support equipment located at the base of the proposed structure would be screened by natural buffers and landscaping. Plaintiff presented balloon test photos showing a photograph of a weather balloon floated at 108 ft. from various vantage points around the proposed site. Plaintiff also presented photographic simulations of the tower at the proposed site based upon the balloon test performed at the site. Copies of

the balloon test photos and photo simulations are attached as Exhibit "12".

62.

Plaintiff also addressed the concern about purported diminution of property values resulting from the proposed tower. Plaintiff presented property valuation studies that indicate that the existence of a wireless telecommunications structure does not result in decreased property values for properties located in the area of the tower. Plaintiff had present a property appraisal professional who conducted and submitted the studies regarding the effect of cell towers on property values and who discussed his conclusion that cell towers do not result in a diminution of property values. See true and correct copies of property appraisals attached hereto as Exhibit "13" and Exhibit "9" at pgs. 87-91.

63.

The proposed tower complies with all requirements set forth in the Ordinance.

64.

The proposed tower site is not located in an area in which tower construction is prohibited.

65.

The proposed structure will not increase or overtax the load on public facilities.

66.

The proposed structure will not result in increased cost to the City.

67.

The proposed structure will not adversely impact the environment.

68.

The proposed structure will not deter the value or impede the development of adjacent property.

69.

At the April 12, 2010 hearing, several citizens spoke in opposition to the proposed facility primarily voicing generalized aesthetic concerns, speculating about the possible diminution of property values that would be caused by the proposed tower, speculating about the signal coverage afforded by the tower, and speculating about T-Mobile's "true" motives for constructing the tower.

70.

Following the presentations by Plaintiff and the opposition, several Commissioners commented about the Application and the presentations from Plaintiff and from the opposition. Councilman Igleheart made the completely incorrect and unsupported statement with respect to the Application that "[i]t's not our mandate to level the field for inferior technology." Further, ignoring the facts that the entire search area for the site is residentially zoned and that the Ordinance allows towers in residentially-zoned areas, Councilman Igleheart noted his belief that "I just don't think it's appropriate for residentially zoned properties to have cell towers in their location." Councilman Dippolito echoed this comment by stating "I think it's pretty hard to look at a cell tower like this and to not consider that would have an adverse impact on a residential area." This statement also reflects an intent to preclude and prohibit telecommunications towers from residential areas despite the fact that the entire search area is residentially-zoned and that the

Ordinance allows the construction of wireless telecommunications facilities in residentially-zoned areas.

71.

The undisputed evidence of record demonstrates that the proposed tower will comply with all requirements of the Ordinance.

72.

The record evidence demonstrates that the proposed tower will not detract from the aesthetic appeal of the surrounding area.

73.

Further, generalized aesthetic concerns are an insufficient basis for denial of a telecommunications tower tall structures permit.

74.

Despite the evidence showing that the proposed tower meets or exceeds all requirements of the Ordinance, the Application was denied.

75.

Defendant issued a letter dated April 14, 2010 denying the Application. The letter gives no reasons for the denial. A true and correct copy of the denial letter is attached hereto as Exhibit "14".

76.

Defendant knew that the denial of the Application or the imposition of unreasonable conditions would have the effect of prohibiting the expansion of Plaintiff's wireless network in such a manner as to cause coverage gaps in the area, or to negatively

impact the network by causing an inability of Plaintiff's system to properly function.

77.

Upon information and belief, other providers of services that are functionally equivalent to those provided by Plaintiff are able to provide reliable, uninterrupted, in-building wireless telephone services to their customers. Indeed, as noted by Councilman Igleheart, "other carriers apparently have sufficient coverage in this area."

78.

Defendant knew that denial of the Application or the imposition of unreasonable conditions would have the effect of unreasonably discriminating against Plaintiff and in favor of other providers of services functionally equivalent to those services provided by Plaintiff.

79.

At the hearing on its Application, Plaintiff presented in detail the need for the proposed structure and submitted its evidence regarding Plaintiff's compliance with all requirements of the Ordinance relating to telecommunication towers.

80.

Defendant, in making its denial, did not comply with the City's law, nor with the law of the State of Georgia, nor with the law of the United States.

81.

As a result, Plaintiff has been deprived of its rights to use the Property in accordance with the law for a use permitted under the law.

82.

In addition, Plaintiff's legal remedy is inadequate, and there has been a defect of legal justice.

83.

Plaintiff has suffered and continues to suffer a substantial detriment and damages as a result of the actions of Defendant.

84.

Unless the Plaintiff's Application is granted and a permit is issued, Defendant will continue to refuse to issue the approvals necessary to place the structure on the Property.

85.

Defendant has been stubbornly litigious with regard to this Application. Specifically, Defendant arbitrarily and capriciously refused to enter into a lease for the proposed site at Fire Station No. 3, despite the fact that it was a preapproved site contained in the Siting Plan. Left with no alternative, Plaintiff sought to place its tower on the Property, another site which meets all requirements contained in the Ordinance, and Defendant denied that site as well. Finally, despite the fact that Defendant's Ordinance permits the construction of tower in residentially-zoned areas, it is clear that the City will refuse to approve a tower for construction in a residential area absent a court order.

86.

Defendant's actions and conduct in connection with the denial of the permit represented in the Application, as well as Defendant's conduct with respect to the proposed site at Fire Station No. 3, have

occurred in bad faith and have caused Plaintiff unnecessary trouble and expense. Defendant has been stubbornly litigious.

87.

The issue of the location of wireless telecommunications facilities is an issue of national and federal concern.

COUNT I—VIOLATION OF THE TELECOMMUNICATIONS ACT

(DECISION NOT SUPPORTED BY SUBSTANTIAL EVIDENCE)

88.

The allegations contained in the foregoing paragraphs are hereby incorporated by reference as if rewritten in their entirety.

89.

The Telecommunications Act became effective on February 8, 1996. Section 332(c) of 47 U.S.C.A. provides, in pertinent part, as follows:

> (i) The regulation of the placement, construction and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services;

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request for authorization to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record; and

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions.

47 U.S.C.A. § 332(c)(7)(B).

90.

The Telecommunications Act further provides that:

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any

> court of competent jurisdiction. The court shall hear and decide such action on an expedited basis . . .

Id.

91.

Plaintiff is entitled to the protections of the Telecommunications Act. Plaintiff's Application constituted a request to place and construct a cell site on the subject Property.

92.

Defendant's denial of Plaintiff's Application was not supported by substantial evidence. Therefore, Defendant's denial of Plaintiff's Application constituted a violation of the Telecommunications Act.

93.

The failure and refusal of the Defendant to approve Plaintiff's Application is based upon materially incorrect findings of fact and a misunderstanding or misapplication of the applicable laws.

94.

Plaintiff has no adequate remedy at law and will suffer irreparable injury unless the relief requested is granted.

95.

Plaintiff is entitled to expedited issuance of an injunction directing Defendant to approve Plaintiff's Application and to issue the permit that is the subject of the Application.

96.

Plaintiff is entitled to recovery of its attorneys' fees in this action.

COUNT II—VIOLATION OF THE TELECOMMUNICATIONS ACT

(PROHIBITION OF WIRELESS SERVICES)

97.

The allegations contained in the foregoing paragraphs are hereby incorporated by reference as if rewritten in their entirety.

98.

As a consequence of Defendant's denial of the Application, Plaintiff will be unable to fill a gap in coverage necessary to provide competitive, reliable, uninterrupted, in-building wireless telephone services to its customers. Plaintiff's ability to render quality service to Defendant's own constituents will be hampered substantially.

99.

Defendant's actions have the effect of prohibiting the provision of personal wireless services in a given area in violation of federal law, and should be reversed under the authority of 47 U.S.C.A. § 332(c)(7)(B)(v).

100.

Plaintiff has no adequate remedy at law and will suffer irreparable injury unless the relief requested is granted. Plaintiff is entitled to expedited issuance of an injunction directing Defendant to issue the permit sought in Plaintiff's Application.

101.

Plaintiff is entitled to recovery of its attorneys' fees in this action.

COUNT III—VIOLATION OF THE TELECOMMUNICATIONS ACT

(UNREASONABLE DISCRIMINATION AMONG PROVIDERS OF FUNCTIONALLY EQUIVALENT SERVICES)

102.

The allegations contained in the foregoing paragraphs are hereby incorporated by reference as if rewritten in their entirety.

103.

Other providers of services that are functionally equivalent to those provided by Plaintiff are able to provide reliable, uninterrupted, in-building wireless telephone services to their customers.

104.

As a consequence of Defendant's denial of the Application, Plaintiff will be unable to provide competitive, reliable, uninterrupted, in-building wireless telephone services to its customers. Plaintiff's ability to render quality service to Defendant's own constituents will be hampered substantially.

105.

Defendant's actions have the effect of unreasonably discriminating among providers of functionally equivalent services in violation of federal law, and should be reversed under the authority of 47 U.S.C. § 332(c)(7)(B)(v).

106.

Plaintiff has no adequate remedy at law and will suffer irreparable injury unless the relief requested is granted. Plaintiff is entitled to expedited issuance of an injunction directing Defendant to issue the permit sought in Plaintiff's Application.

107.

Plaintiff is entitled to recovery of its attorneys' fees in this action.

WHEREFORE, Plaintiff prays as follows:

(a) That summons and process issue and that the Defendant be served as provided by law;

(b) That this Court issue an Order granting an injunction or other mandatory equitable relief compelling Defendant to issue the tall structures permit sought by Plaintiff;

(c) That this Court set aside and declare the decision of the Defendant on Plaintiff's Application to be unlawful, unconstitutional, null and void;

(d) That this Court hold a hearing on an expedited basis as to Plaintiff's claims under the Telecommunications Act;

(e) That this case be given any and all preferences on the Court's calendars as may be required by law;

(f) That the Clerk of the Roswell City Council be required to forward the entire record on an expedited basis, including all exhibits, evidence, documents, video and tape recordings, and other matters collected in connection with Defendant's consideration of the Application to this Court for use in connection with the relief sought by Plaintiff; and

(g) For such other, further and different relief as the Court may deem just and proper under the evidence and the law.

ARNALL GOLDEN GREGORY LLP

/s/ Scott E. Taylor

Scott E. Taylor
Georgia Bar No. 785596
J. Tucker Barr
Georgia Bar No. 140868

Counsel for Plaintiff
T-Mobile South LLC

171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363
(404) 873-8500
(404) 873-8501 (Fax)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. _____

T-MOBILE SOUTH LLC,

Plaintiff,

v.

GWINNETT COUNTY, GEORGIA,

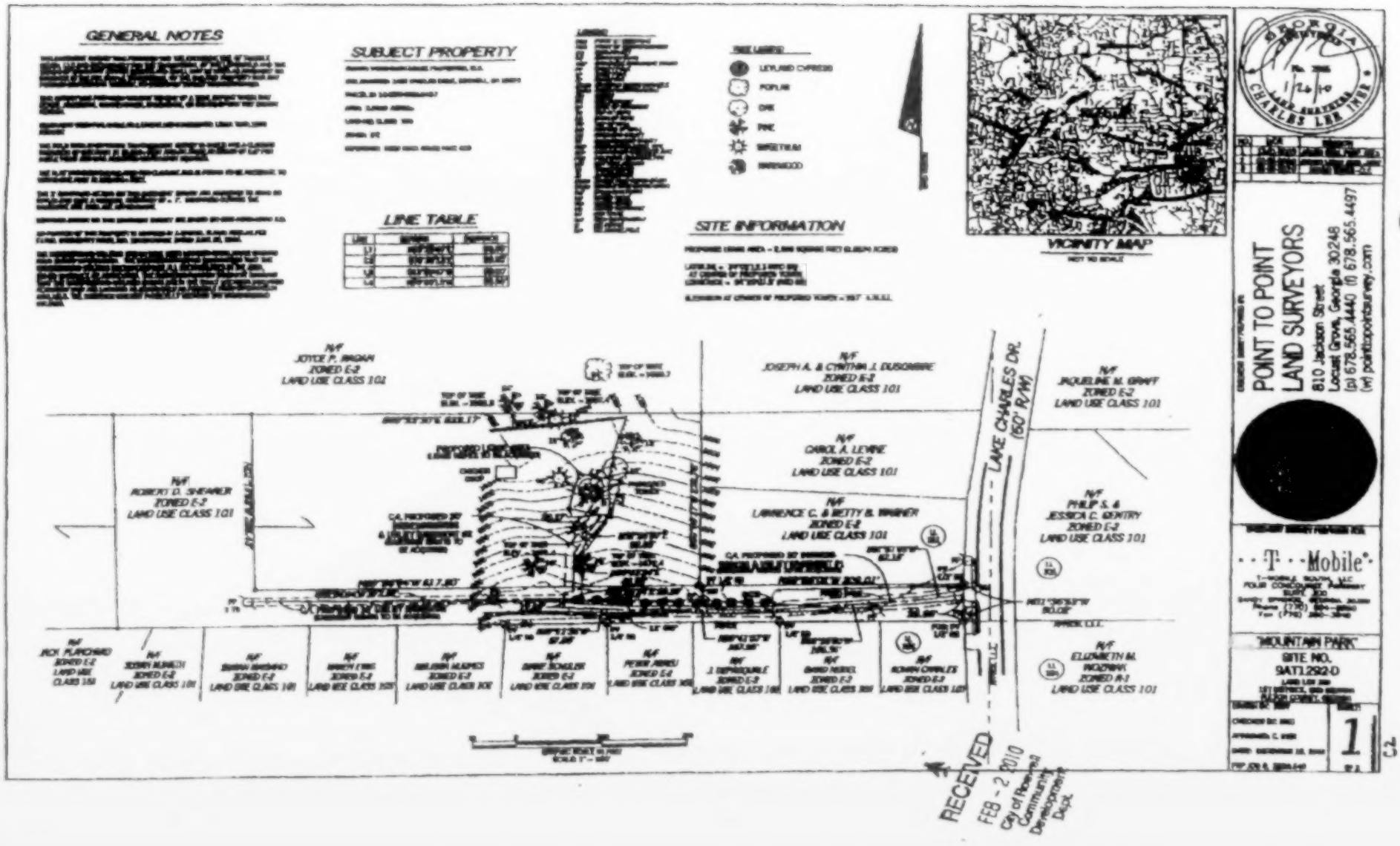
Defendant.

VERIFICATION

I **GREG HAZLEHURST** hereby declare under penalty of perjury that the facts contained in the foregoing Verified Complaint are true and correct.

Executed on this 7th day of May, 2010.

/s/ Greg Hazlehurst
Greg Hazlehurst
Manager of Civil Construction
T-Mobil- South LLC



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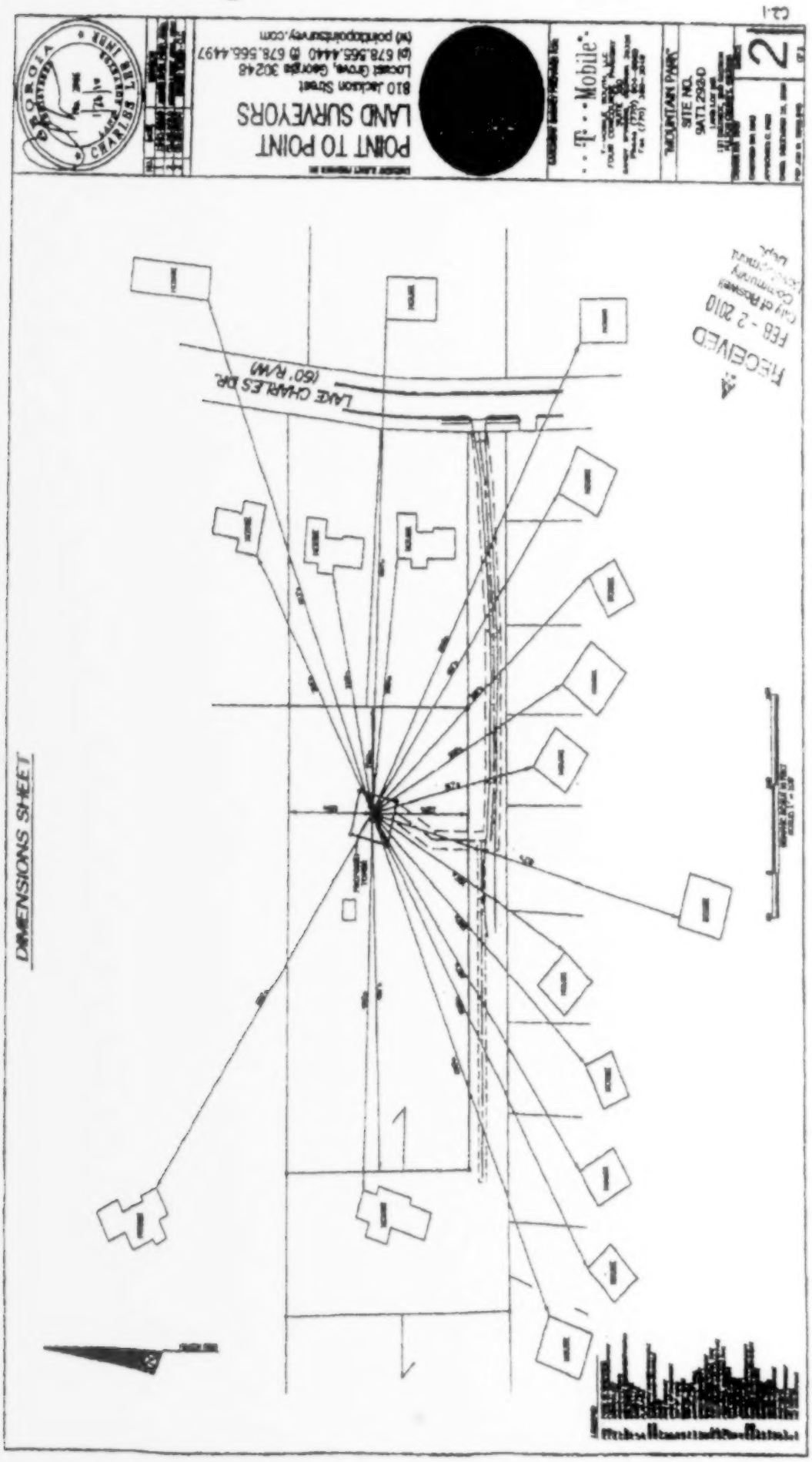
POINT TO POINT
LAND SURVEYORS
810 Jackson Street
Locust Grove, Georgia 30248
(o) 678.565.4440 (f) 678.565.4497
(w) pointtopointsurvey.com
T-Mobile
MOUNTAIN PARK
SITE NO.
9ATL2930
2
DIMENSIONS SHEET
LAKE CHARLES DR
(60' R/W)
RECEIVED
FEB - 2 2010
Clerk of Superior
Court
DeKalb County
Georgia

LEGAL DESCRIPTION SHEET

SUBJECT PROPERTY

ALL THAT TRACT OR PARCEL OF LAND LYING AND BEING IN LAND LOT 263, 1ST DISTRICT, 2ND SECTION, FULTON COUNTY, GEORGIA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

TO FIND THE POINT OF BEGINNING, COMMENCE AT A ½" REBAR FOUND AT THE INTERSECTION OF THE LAND LOT LINE COMMON TO LAND LOTS 263 AND 286 AND THE WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE (HAVING A 60-FOOT RIGHT-OF-WAY); THENCE LEAVING SAID INTERSECTION AND RUNNING ALONG SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE, NORTH 03°39'58" WEST, 30.00 FEET TO A ½" REBAR FOUND; THENCE LEAVING SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE AND RUNNING, NORTH 89°36'01" WEST, 308.01 FEET TO A ½" REBAR FOUND AND THE TRUE POINT OF BEGINNING; THENCE RUNNING, NORTH 89°36'04" WEST, 557.89 FEET TO A POINT; THENCE, NORTH 02°23'56" EAST, 1046.43 FEET TO A POINT; THENCE, SOUTH 89°52'37" EAST, 835.17 FEET TO A POINT; THENCE, SOUTH 45°04'13" WEST, 252.76 FEET TO A POINT AND THE TRUE POINT OF BEGINNING.

SAID TRACT CONTAINS 2.8619 ACRES (124,650 SQUARE FEET), MORE OR LESS.

PROPOSED 20' INGRESS-EGRESS & UTILITY EASEMENT #1

TOGETHER WITH A PROPOSED 20-FOOT WIDE INGRESS-EGRESS AND UTILITY EASEMENT LYING AND BEING IN LAND LOT 263, 1ST DISTRICT, 2ND SECTION, FULTON COUNTY, GEORGIA, BEING DESCRIBED BY THE FOLLOWING CENTERLINE DATA:

TO FIND THE POINT OF BEGINNING, COMMENCE AT A ½" REBAR FOUND AT THE INTERSECTION OF THE LAND LOT LINE COMMON TO LAND LOTS 263 AND 286 AND THE WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE (HAVING A 60-FOOT RIGHT-OF-WAY); THENCE LEAVING SAID INTERSECTION AND RUNNING ALONG SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE, NORTH 03°39'58" WEST, 30.00 FEET TO A POINT; THENCE LEAVING SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE AND RUNNING, SOUTH 89°36'01" EAST, 308.01 FEET TO A POINT; THENCE, NORTH 45°04'13" EAST, 37.16 FEET TO A POINT; THENCE, SOUTH 89°52'37" WEST, 349.94 FEET TO A POINT; THENCE, NORTH 89°43'09" WEST, 147.56 FEET TO A POINT; THENCE, NORTH 87°11'39" WEST, 47.85 FEET TO A POINT; THENCE, NORTH 02°48'21" EAST, 20.23 FEET TO THE ENDING AT A POINT.

PROPOSED 20' INGRESS-EGRESS & UTILITY EASEMENT #2

TOGETHER WITH A PROPOSED 20-FOOT WIDE INGRESS-EGRESS AND UTILITY EASEMENT LYING AND BEING IN LAND LOT 263, 1ST DISTRICT, 2ND SECTION, FULTON COUNTY, GEORGIA, BEING DESCRIBED BY THE FOLLOWING CENTERLINE DATA:

TO FIND THE POINT OF BEGINNING, COMMENCE AT A ½" REBAR FOUND AT THE INTERSECTION OF THE LAND LOT LINE COMMON TO LAND LOTS 286 AND 263 AND THE WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE (HAVING A 60-FOOT RIGHT-OF-WAY); THENCE LEAVING SAID INTERSECTION AND RUNNING ALONG SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE, NORTH 03°39'58" WEST, 30.00 FEET TO A POINT; THENCE LEAVING SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE AND RUNNING, SOUTH 89°36'01" WEST, 308.01 FEET TO A POINT; THENCE, SOUTH 89°36'04" WEST, 1,046.34 FEET TO A POINT; THENCE, NORTH 89°43'09" WEST, 147.56 FEET TO A POINT; THENCE, NORTH 87°11'39" WEST, 47.85 FEET TO A POINT; THENCE, NORTH 02°48'34" EAST, 20.23 FEET TO A POINT AND THE TRUE POINT OF BEGINNING; THENCE RUNNING, NORTH 89°52'37" EAST, 44.66 FEET TO A POINT; THENCE, NORTH 32°39'03" EAST, 56.66 FEET TO THE ENDING AT A POINT.

PROPOSED 10' UTILITY EASEMENT

TOGETHER WITH A PROPOSED 10-FOOT WIDE UTILITY EASEMENT LYING AND BEING IN LAND LOT 263, 1ST DISTRICT, 2ND SECTION, FULTON COUNTY, GEORGIA, BEING DESCRIBED BY THE FOLLOWING CENTERLINE DATA:

TO FIND THE POINT OF BEGINNING, COMMENCE AT A ½" REBAR FOUND AT THE INTERSECTION OF THE LAND LOT LINE COMMON TO LAND LOTS 263 AND 286 AND THE WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE (HAVING A 60-FOOT RIGHT-OF-WAY); THENCE LEAVING SAID INTERSECTION AND RUNNING ALONG SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE, NORTH 03°39'58" WEST, 30.00 FEET TO A POINT; THENCE LEAVING SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE AND RUNNING, SOUTH 89°36'01" WEST, 308.01 FEET TO A POINT; THENCE, SOUTH 89°36'04" WEST, 1,046.34 FEET TO A POINT; THENCE, NORTH 89°43'09" WEST, 147.56 FEET TO A POINT; THENCE, NORTH 87°11'39" WEST, 47.85 FEET TO A POINT; THENCE, NORTH 02°48'34" EAST, 10.84 FEET TO A POINT AND THE TRUE POINT OF BEGINNING; THENCE RUNNING, NORTH 89°36'04" WEST, 377.22 FEET TO THE ENDING AT A POINT.

PROPOSED LEASE AREA

ALL THAT TRACT OR PARCEL OF LAND LYING AND BEING IN LAND LOT 263, 1ST DISTRICT, 2ND SECTION, FULTON COUNTY, GEORGIA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

TO FIND THE POINT OF BEGINNING, COMMENCE AT A ½" REBAR FOUND AT THE INTERSECTION OF THE LAND LOT LINE COMMON TO LAND LOTS 263 AND 286 AND THE WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE (HAVING A 60-FOOT RIGHT-OF-WAY); THENCE LEAVING SAID INTERSECTION AND RUNNING ALONG SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE, NORTH 03°39'58" WEST, 30.00 FEET TO A POINT; THENCE LEAVING SAID WESTERLY RIGHT-OF-WAY LINE OF LAKE CHARLES DRIVE AND RUNNING, SOUTH 89°36'01" WEST, 308.01 FEET TO A POINT; THENCE, SOUTH 89°36'04" WEST, 1,046.34 FEET TO A POINT; THENCE, NORTH 89°43'09" WEST, 147.56 FEET TO A POINT; THENCE, NORTH 87°11'39" WEST, 47.85 FEET TO A POINT; THENCE, NORTH 02°48'34" EAST, 20.23 FEET TO A POINT; THENCE, NORTH 89°52'37" EAST, 44.66 FEET TO A POINT; THENCE, NORTH 32°39'03" EAST, 56.66 FEET TO A POINT; THENCE, NORTH 89°36'04" WEST, 377.22 FEET TO THE TRUE POINT OF BEGINNING; THENCE, NORTH 89°36'04" WEST, 30.00 FEET TO A POINT; THENCE, NORTH 00°23'56" EAST, 30.00 FEET TO A POINT; THENCE, SOUTH 89°36'04" EAST, 30.00 FEET TO A POINT; THENCE, SOUTH 00°23'56" WEST, 30.00 FEET TO A POINT AND THE TRUE POINT OF BEGINNING.

SAID TRACT CONTAINS 0.0624 ACRES (2,700 SQUARE FEET), MORE OR LESS.

RECEIVED
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City of Roswell
Community
Development
Dept.

GEORGIA REGISTERED LAND SURVEYOR CHARLES LEE INGRAM 1-26-10

POINT TO POINT LAND SURVEYORS
810 Jackson Street
Locust Grove, Georgia 30248
tel 678.565.4440 fx 678.565.4457
(w) pointtopointsurvey.com

T-Mobile
T-MOBILE SOUTH, LLC
FOUR CONCOURSE PARKWAY
SUITE 200
ATLANTA, GEORGIA 30328
Phone (770) 512-8900
Fax (770) 512-8949

"MOUNTAIN PARK"
SITE NO.
9AT1292-0
LAND LOT 263
1ST DISTRICT, 2ND SECTION
FULTON COUNTY, GEORGIA

DRAWN BY: CBS
CHECKED BY: MMJ
APPROVED BY: PWP
DATE: DECEMBER 16, 2009
FOR: ZONING APPLICATION

3
OF 3

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Article 21.2 Standards for Wireless Communication Facilities

Section 21.2.1 Purpose and Intent.

The purpose of this ordinance is to establish guidelines for the siting of all wireless communications towers and antennas which will encourage the development of wireless communications while protecting the health, safety, and welfare of the public and maintaining the aesthetic integrity of the community. The goals of this ordinance are:

(a) To protect residential areas and land uses from potential adverse impact of telecommunications towers, antenna support structures and wireless communications facilities;

(b) To minimize the total number of towers and antennas within the community necessary to provide adequate personal wireless services to residents of Roswell;

(c) To locate telecommunications towers and antennas in areas where adverse impacts on the community are minimized;

(d) To encourage the design and construction of towers and antennas to minimize adverse visual impacts;

(e) To avoid potential damage to property caused by wireless communications facilities by insuring that such structures are soundly and carefully designed, constructed, modified, maintained, and removed when no longer used or when determined to be structurally unsound;

(f) To preserve those areas of significant scenic or historic merit;

(g) To facilitate implementation of a master siting plan for the City of Roswell;

(h) To promote and encourage the joint use of new and existing tower sites among service providers;

(i) To enhance the ability of the providers of wireless communications services to deliver such services to the community effectively and efficiently.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.2 Definitions.

Accessory use. A tower and/or antenna is considered a principal use if located on any lot or parcel of land as the sole or primary structure, and is considered an accessory use if located on a lot or parcel shared with a different existing primary use or existing structure.

Alternative tower structure means man-made trees, clock towers, bell steeples, light poles and similar alternative-design mounting structures, that in the opinion of council, are compatible with the natural setting and surrounding structures, and effectively camouflage or conceal the presence of antennas or towers.

Antenna shall mean any exterior transmitting or receiving devices mounted on a tower, building or structure and used in communications that radiate or capture electromagnetic waves, digital signals, analog signals, radio, wireless telecommunications signals or other communications signals. Such definition does not include, for purposes of this article, radar antennas, amateur radio antennas, satellite earth stations, MMDS antennas, television receiving antennas and direct broadcast satellite dishes.

Co-location is the placement of antennas of two (2) or more service providers on the same tower or accessory structure.

Height when referring to a tower or other structure, means distance measured from the finished grade of the parcel to the highest point on the tower or other structure, including the base pad and any antenna.

Historic or scenic views mean geographic areas in Roswell which have been formally designated as part of the historic district; have been included in any nature preserve or scenic preservation efforts; or have sufficient historic or scenic merit as determined by council and the historic preservation commission so as to require preservation. A scenic view may be from a stationary viewpoint or be seen as one travels along a roadway or path.

Master siting plan refers to the siting map developed by council and approved by city council to identify appropriate sites for the location of wireless transmission facilities as may be amended from time to time. Such map may be derived from propriety information submitted by wireless providers.

Microcell means a wireless communication facility comprised of antennas extending no more than four (4) feet above the structure to which it is attached, and with an area no larger than five hundred seventy-six (576) square inches (e.g. 3' x 1 1/2') panel antenna or a two-foot diameter parabolic antenna as viewed from any one point.

Preexisting towers and preexisting antennas mean any tower or antenna for which a building permit or special use permit has been properly issued prior to the effective date of this ordinance, including permitted towers or antennas that have not yet been

constructed so long as such approval is current and not expired.

Technically feasible and viable means capable of being provided through technology which has been demonstrated in actual applications (not simply through tests or experiments) to operate in a workable manner.

Tower means any structure that is designed and constructed primarily for the purpose of supporting one (1) or more antennas, including self-supported or monopole towers. The term includes radio and television transmission towers, microwave towers, common-carrier towers, and cellular telephone or PCS towers.

Wireless transmission facilities shall mean the buildings, cabinets, equipment and property, including but not limited to, generating and switching stations, repeaters, cables, wires, conduits, ducts, pedestals, antennas, towers, alternative tower structures, electronics and other appurtenances used to transmit, receive, distribute, provide or offer low-power mobile voice transmission, data transmission or other wireless communications by linking a wireless network of radio wave transmitting devices through a series of short range, contiguous cells that are part of an evolving cell grid.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.3 Applicability.

All new towers and antennas shall be subject, to the regulations contained within this article except as provided in subsections (a) through (c), inclusive:

(a) *Public Property*. Nothing in this article shall be read to prohibit a government owned tower from

being located at a specific site when the tower is required to protect the public welfare or safety.

(b) *Amateur Radio; Receive-Only Antennas.* This ordinance shall not govern any amateur radio tower, or the installation of any antenna, that is under seventy (70) feet in height and is owned and operated by a federally-licensed amateur radio station operator or is used exclusively for receive only antennas.

(c) *Pre-Existing Towers and Antennas.* Any tower or antenna for which a permit has been properly issued prior to the effective date of this ordinance shall not be required to meet the provisions of this ordinance, other than the requirements of section 21.2.7. Any such towers or antennas shall be referred to in this ordinance as "preexisting towers" or "preexisting antennas." However, in the event a preexisting tower or antenna ceases to function, then the subject tower, antenna and related equipment shall be removed from the subject property within ninety (90) days.

(2003-07-17, Amended, 07/07/2003, (c))

Section 21.2.4 General Requirements.

(a) An application shall be required for the construction or placement of all new wireless transmission facilities and new co-location facilities, antennas or towers within the city limits. Approval of any application for the construction of a tower or placement of an antenna shall be based on consideration of the following factors:

(1) Proximity to residential structures and residential district boundaries;

(2) The proposed height of the tower;

(3) Nature of uses on adjacent properties;

(4) Surrounding topography, tree coverage and foliage;

(5) Design of the facility, with particular reference to design characteristics which have the effect of reducing or eliminating visual obtrusiveness;

(6) Proposed ingress and egress;

(7) Availability of suitable existing towers, other structures, or alternative technologies (microcells) not requiring the use of towers or structures;

(8) Demonstrated need for the telecommunications facility at the specified site;

(9) Utilization of the City of Roswell Master Siting Plan, as amended.

(b) All applications submitted to the community development department shall include a complete inventory of the applicant's existing wireless transmission facilities including towers and receivers/ transmitters located within the City of Roswell or a one-half-mile radius surrounding the city limits, including each asset's location (plane coordinates), height and co-location usage or capabilities, and any special design features. The city shall utilize such information, subject to any restrictions on disclosure requested by the applicant, to promote co-location alternatives for other applicants.

(c) At the time of filing the application for construction or placement of a wireless trans-

mission facility, the applicant shall provide a site plan and information regarding tower or accessory structure location, neighboring uses and proposed landscaping as described below. Additional documentation to be submitted with the site plan and certified by an experienced radio frequency engineer shall delineate coverage and propagation zones, identify type of antenna and mounting location, specify type of band currently in use, and state co-location capabilities.

(1) The scaled site plan shall clearly indicate the location, type and height of the proposed tower or accessory structure to be utilized, on-site land uses and zoning, adjacent land uses and zoning including proximity to historic or scenic view corridors, adjacent roadways, proposed means of access, setbacks for property lines, elevation drawings of the proposed tower, accessory structure and any other structures, topography, parking, and other information deemed necessary by council to assess compliance with this ordinance.

(2) Legal description of the parent tract and leased parcel (if applicable).

(3) A definition of the area of coverage and radio frequency goals to be served by the antenna or tower and the extent to which such antenna or tower is needed for coverage and/or capacity.

(4) The setback distance between the proposed wireless transmission facility and the nearest residential unit or residentially used structure.

(5) Structural integrity analysis where antennas and equipment will be attached to an existing structure.

(6) Landscaping shall be designed in such a way as to preserve existing mature growth and to provide in the determination of the design review board, a suitable buffer of plant materials that mitigates the view of the telecommunications facility and accessory structures from surrounding property.

(d) Each application shall be accompanied by a fee of $1,000.00 to offset the costs associated with processing such application. In addition, applicants shall be responsible for independent engineering costs incurred by the city which exceed such fee up to an additional $2,000.00, if requested by the city. The applicant shall be responsible for additional fees throughout the process as described further within this ordinance. All fees are subject to change as amended by the mayor and city council by resolution.

(e) Landscaping plans and the design and placement of the wireless transmission facility on an approved site shall require review and approval of the Roswell Design Review Board prior to issuance of a building permit to insure architectural and aesthetic compatibility with the surrounding area.

(f) Prior to issuance of a building permit, compliance with Section 106 of the National Historic Preservation Act, 16 U.S.C. § 461 et seq. shall be demonstrated.

(g) In approving any application, the zoning director, design review board, or council may impose additional conditions to the extent determined necessary to minimize adverse effects on adjoining properties.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.5 Development Requirements for Towers.

(a) Towers may be located only in the following zoning districts subject to the restrictions and standards contained herein:

I-1 Office and Business Distribution District

C-3 Highway Commercial

Wireless transmission facilities in the OCMS (Office-Commercial Multi-Story Mixed Use), and any other districts shall be alternative tower structures only; provided however, towers may be allowed on publicly owned property regardless of zoning district.

(b) No new wireless transmission facilities shall be located within two thousand five hundred (2,500) feet of any preexisting wireless transmission site unless such new facility is concealed through use of alternative tower structures or is otherwise camouflaged, and a variance is granted by the mayor and council of the City of Roswell:

(c) All applicants seeking to erect a tower must demonstrate that no existing tower or structure can accommodate the proposed antenna(s). Evidence of an engineering nature shall be documented by the submission of a certification by an engineer. Such evidence may consist of the following:

(1) No existing towers or structures are located within the geographic area required to meet applicant's engineering requirements.

(2) No existing structure is of sufficient height to meet the applicant's engineering requirements.

(3) No existing tower or structure has sufficient structural strength to support applicant's proposed antenna(s) and related equipment.

(4) Applicant's proposed antenna(s) would cause electromagnetic interference with the antenna(s) on the existing tower or structure.

(5) Such other limiting factor(s) as may be demonstrated by the applicant and verified by an engineer of the city's choosing.

(d) Setbacks: Setbacks for towers and above-ground transmission facilities shall be as follows:

(1) All transmission facilities, except buried portions, shall be set back from all adjoining properties zoned non-residential a distance equal to the underlying setback requirement in the applicable zoning district.

(2) When a tower is adjacent to a residential use, the tower and entire transmission facility must be set back from the nearest residential lot line a distance equal to the height of the tower.

(e) Unless otherwise specified by community development staff and the design review board, towers shall be enclosed by vinyl chain link security fencing not less than six (6) feet in height and shall be equipped with an appropriate anti-climbing device.

(f) All new towers in excess of one hundred (100) feet which do not incorporate alternative design features must be designed and built in a manner that allows other entities to co-locate on the structure using the following guidelines:

MAXIMUM TELECOMMUNICATIONS TOWER HEIGHTS

TABLE INSET:

Zoning District	Two Users	Three Users	Four Users
I-1	120'	150'	180'
C-3	120'	150'	150'

(g) All towers and their related structures shall maximize the use of building materials, colors, textures, screening and landscaping that, in the opinion of the design review board and staff, effectively blend the tower facilities within the surrounding natural setting and built environment. Where appropriate, towers shall be painted so as to reduce their visual obtrusiveness, subject to any applicable standards of the Federal Aviation Administration (FAA).

(2003-12-32, Amended, 12/08/2003, (a) amended; 2003-07-17, Amended, 07/07/2003)

Section 21.2.6 Approval Process.

(a) Subject to certification by the zoning director of compliance with the general requirements and standards enumerated above and with the consent of council, the following uses are subject to expedited approval, which shall be defined as approval within thirty (30) days of receiving applications, supporting engineering certifications

and lease approval, if any, without the necessity of public hearing:

(1) Antennas or towers located on property owned, leased, or otherwise controlled by the City of Roswell provided accessory structures are located underground, where technically feasible, and a license, permit or lease authorizing such tower is thereafter approved by City of Roswell.

(2) Installing an antenna on an existing structure, so long as said installation is considered to be a stealth technology installation that does not significantly change the profile of the existing structure and so that the installation is not readily noticeable to the untrained eye. Such installations including cables leading to the antennas shall be painted to match the paint and colors on the existing structure and shall not protrude from the existing structure in a noticeable fashion.

(3) Co-location by installing an antenna on any existing tower or alternative tower structure.

(4) Replacing an existing tower with a new tower designed to accommodate two (2) or more users so long as such new tower does not exceed the height limitations of subsection 21.2.5(f) and setback requirements of this article are met. After the replacement tower is built, only one (1) tower shall remain on such site. Support equipment shall, where technically feasible, be located underground.

(5) Locating any alternative tower structures provided accessory structures are located underground, where technically feasible; or

otherwise incorporated into the alternative structure.

(6) Installing any antenna or tower not to exceed the limitations contained in subsection 21.2.5(f) in any area zoned I-1 (light industrial) or C-3 and provided accessory structures are located underground, where technically feasible, or shielded to the satisfaction of the design review board.

(7) Installing any antenna or tower in a location identified on the City of Roswell Master Siting Plan, as amended, provided accessory structures are located underground where technically feasible, or shielded to the satisfaction of the design review board.

If council determines that any application does not meet the general application requirements, development requirements and/or standards enumerated herein, or such application conflicts with the Master Siting Plan, approval of the application shall be denied provided substantial evidence exists to support such denial. Any aggrieved party may appeal the denial to the Fulton County Superior Court. For purposes of this section, an aggrieved party is one who demonstrates that his or her property will suffer special damage as a result of the decision complained of rather than merely some damage that is common to all property owners and citizens similarly situated.

(b) If the proposed tower or antenna is not included under the above described expedited approval uses, or the application does not on its face satisfy the development standards and other criteria specified herein, then a public hearing. before the mayor and council shall be required

for the approval of the construction of a wireless transmission facility in all zoning districts. Applicants shall apply for a public hearing through the community development department and pay the required five-hundred-dollar fee at such time. Applications, when complete, shall be placed on the next available agenda of the mayor and council at which zoning matters are considered. At least thirty (30) days prior to any scheduled hearing, the community development department shall cause a sign to be posted on the property and the publication of a public notice in a newspaper of general circulation. Said notice shall state the nature of the application, street location of the proposal and height of the proposed structure.

Before approving an application for an "other use," the governing authority may impose zoning conditions to the extent necessary to buffer or otherwise minimize any adverse effect of the proposed tower on adjoining properties. The factors considered in granting such a permit include those enumerated in sections 21.2.4 and 21.2.5. The mayor and council may waive one (1) or more of these criteria, if, in their discretion doing so will advance the goals of this article as stated in section 21.2.1. Approved applications shall be valid for one (1) year from the date of the approval by the mayor and council.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.7 Maintenance of Facilities.

(a) All wireless transmission facilities and related landscaping shall be maintained by the facility owner in good condition, order, and repair so that they shall not endanger the life or property of

any person, nor shall they be a blight upon the property.

(b) All maintenance or construction on wireless transmission facilities shall be performed by persons employed by or under contract to the owner between the hours of 8:30 a.m. and 5:30 p.m. Monday through Friday except in cases of emergency or when an after-hours permit is obtained pursuant to section 5.1.13 of the City of Roswell Code of Ordinances. Access to facilities on city owned property shall be determined on a case-by-case basis by the department responsible for such property. The hours of access to city sites shall not exceed those specified above. Persons may not be present on site unless performing construction or maintenance at such site.

(c) The owner or user of any telecommunications facility shall be required to submit a "facility in use certification" annually to the community development department. Any antenna or tower that is not operated for a continuous period of twelve (12) months or is not properly maintained shall be considered abandoned, and the owner of such antenna or tower shall remove same and any structures housing supporting equipment within ninety (90) days of receipt of notice from the governing authority of such abandonment. If such antenna or tower is not removed or returned to good condition within said ninety (90) days, the governing authority may remove such antenna or tower at the owner's expense.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.8 Waiver of Requirements.

No exception, waiver or variance to the conditions and requirements contained herein shall be granted unless expressly provided for in this ordinance, or the mayor and council find that the proposed tower or wireless transmission facility is necessary and essential to providing the wireless service.

(2003-07-17, Amended, 07/07/2003)

Sections 21.2.9, 21.2.10 Reserved.

Section 21.2.11 Facilities Lease.

The city council may approve facilities leases for the location of wireless transmission facilities and other telecommunications facilities upon city owned property. Neither this section, nor any other provision of this article shall be construed to create an entitlement or vested right in any person or entity of any type.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.12 Lease Application.

Any person that desires to solicit the city's approval of a facilities lease pursuant to this article shall file a lease proposal with the city's community development department which, in addition to the information required by section 21.2.4, shall include the following:

(a) A description of the wireless transmission facilities or other equipment proposed to be located upon city property;

(b) A description of the city property upon which the applicant proposes to locate wireless transmission facilities or other equipment;

(c) Preliminary plans and specifications in sufficient detail to identify:

(1) The location(s) of existing wireless transmission or telecommunications facilities or other equipment upon the city property, whether publicly or privately owned;

(2) The location and source of electric and other utilities required for the installation and operation of the proposed facilities;

(d) Accurate scaled conceptual drawings and diagrams of sufficient specificity to analyze the aesthetic impacts of the proposed wireless transmission facilities or other equipment;

(e) Whether the applicant intends to provide cable service, video dialtone service or other video programming service from the facility, and sufficient information to determine whether such service is subject to cable franchising;

(f) An accurate map showing the location of any wireless transmission or telecommunications facilities in the city that applicant intends to use or lease;

(g) A landscaping bond in an amount to be determined by the city arborist;

(h) Such other and further information as may be requested by the city; and

(i) An application fee for lease negotiation in the amount of $250.00.

Section 21.2.13 Determination by the City.

Recognizing that the city is under no obligation to grant a facilities lease for the use of city property,

the city shall strive to consider and take action on applications for facilities leases within sixty (60) days after receiving a complete application for such a lease. When such action is taken, the city shall issue a written determination granting or denying the lease in whole or in part, applying the standards set forth below, or any other such criteria as the mayor and city council may choose to apply. If the lease application is denied, the determination shall include the reason for denial following review of these factors:

(a) The capacity of the city property and public rights-of-way to accommodate the applicant's proposed facilities.

(b) The capacity of the city property and public rights-of-way to accommodate additional utility and wireless transmission or telecommunications facilities if the lease is granted.

(c) The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the lease is granted.

(d) The public interest in minimizing the cost and disruption of construction upon city property and within the public ways.

(e) The service that applicant will provide to the community and region. The effect, if any, on public health, safety, and welfare if the lease requested is approved. The availability of alternate locations for the proposed facilities.

(f) Whether the applicant is in compliance with applicable federal and state telecommunications laws, regulations and policies, including, but not limited to, the registration requirements

administered by the Georgia Public Service Commission.

(g) The potential of radio frequency and other interference with existing public and private telecommunications or other facilities located upon the city property.

(h) The potential for radio frequency and other interference or impact upon residential, comercial, and other uses located within the vicinity of the city property.

(i) Recommendations of the recreation commission with respect to impact on park and recreation activities.

(j) Recommendations of the public works department with respect to maintenance and security of water towers.

(k) Such other factors, such as aesthetics, as those factors may impact the community.

(l) The maximization of co-location opportunities with other similar uses.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.14 Agreement.

No facilities lease shall be deemed to have been granted hereunder until the applicant and the city have executed a written agreement setting forth the particular terms and provisions under which the lessee has been granted the right to occupy and use the city property.

Section 21.2.15 Nonexclusive Lease.

No facilities lease granted under this article shall confer any exclusive right, privilege, license, or franchise to occupy or use city property for delivery of telecommunications services or any other purposes nor shall approval of a lease entitle the applicant to a permit to construct or place a wireless transmission facility.

Section 21.2.16 Term of Facilities Lease.

Unless otherwise specified in a lease agreement, a facilities lease granted hereunder shall be valid for a term of up to five (5) years, with the lessee granted a maximum of three (3) five-year renewal options which options shall also be subject to approval of council. The term of any such agreement shall not exceed twenty (20) years.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.17 Rights Granted.

No facilities lease granted under this article shall convey any right, title or interest in the city property, but shall be deemed a license only to use and occupy the city property for the limited purposes and term stated in the lease agreement. Further, no facilities lease shall be construed as any warranty of title.

Section 21.2.18 Interference with Other Users.

No facilities lease shall be granted under this article unless it contains a provision which is substantially similar to the following:

The city has previously entered into leases with other tenants for their equipment and wireless transmission facilities. Lessee acknowledges that the

city is also leasing the city property for the purposes of transmitting and receiving telecommunication signals from the city property. The city, however, is not in any way responsible or liable for any interference with lessee's use of the city property which may be caused by the use and operation of any other tenant's equipment, even if caused by new technology. In the event that any other tenant's activities interfere with the lessee's use of the city property, and the lessee cannot work out this interference with the other tenants, the lessee may, upon thirty (30) days' notice to the city, terminate this lease and restore the city property to its original condition, reasonable wear and tear excepted. The lessee shall cooperate with all other tenants to identify the causes of and work towards the resolution of any electronic interference problem. In addition, the lessee agrees to eliminate any radio or television interference caused to city-owned facilities or surrounding residences at lessee's own expense and without installation of extra filters on city-owned equipment. Lessee further agrees to accept such interference as may be received from city operated telecommunications or other facilities located upon the city property subject to this lease.

Section 21.2.19 Ownership and Removal of Improvements.

No facilities lease shall be granted under this article unless it contains a provision which states that all buildings, landscaping, and all other improvements, except telecommunications equipment, shall become the property of the city upon expiration or termination of the lease. In the event that the city requires removal of such improvements, such removal shall be accomplished at the sole expense of the lessee and completed within ninety (90) days after receiving

notice from the city requiring removal of the improvements. In the event that wireless transmission facilities or other equipment are left upon city property after expiration or termination of the lease, they shall become the property of the city if not removed by the lessee upon thirty (30) days' written notice from the city.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.20 Compensation to the City.

Each facilities lease granted under this article is subject to the city's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid for the rights granted to the lessee; provided, nothing in these sections shall prohibit the city and a lessee from agreeing to the compensation to be paid. Such compensation shall be payable in advance of the effective date of the lease and on or before January 31 of each calendar year. Any payments received after the due date shall include a late payment penalty of two (2) percent of the annual rental fee for each day or part thereof past the due date. The compensation shall be negotiated by the city administrator or designee, subject to the city council's final approval, based on the following criteria:

(1) Comparable lease rates for other public or private property;

(2) In the case land is leased, an appraisal opinion upon which the land and air space is rented;

(3) If structure of another user is involved, any amount needed to reimburse that user; in addition to the above;

(4) A yearly escalator rate commonly used in comparable leases;

(5) The additional rent such structure may generate if leased to additional users (the city should be entitled to rent as a result of a sublease); and

(6) Additional fees or charges may be established by the city to cover actual costs of processing the application, including engineering review, inspection and appraisal cost, legal, administration of the agreement, providing on-site services, and/or other direct or indirect costs.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.21 Amendment of Facilities Lease.

Except as provided within an existing lease agreement, a new lease application and lease agreement shall be required of any telecommunications carrier or other entity that desires to expand, modify, or relocate its telecommunications facilities or other equipment located upon city property. If ordered by the city to locate or relocate its telecommunications facilities or other equipment on the city property, the city shall grant a lease amendment without further application. Such amendment must be approved by council.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.22 Renewal Application.

A lessee that desires to exercise a renewal option in its facilities lease under this article shall, not more than one hundred eighty (180) days nor less than one hundred twenty (120) days before expiration of the current facilities lease term, file an application with

the city for renewal of its facilities lease which shall include the following:

(a) The information required pursuant to section 21.2.12 of this article;

(b) Any information required pursuant to the facilities lease agreement between the city and the lessee;

(c) A report certified by a radio frequency engineer that the site is in compliance with current FCC radio emission standards;

(d) All deposits or charges required pursuant to this article; and

(e) An application fee which shall be set by the city council as referenced in this ordinance or as amended from time to time by resolution.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.23 Renewal Determination.

Recognizing that the city is under no obligation to grant a renewal of a facilities lease for the use of city property, the city shall strive to consider and take action on applications for renewal of such leases within thirty (30) days after receiving a complete application for such a lease renewal. When such action is taken, the city shall issue a written determination granting or denying the lease renewal in whole or in part, applying the standards set forth below, or any other such criteria as the city council may choose to apply. If the renewal application is denied, the written determination shall include the reason for denial, such denial may be made after review of these factors or on other grounds as determined by mayor and council:

(a) The financial and technical ability of the applicant.

(b) The legal ability of the applicant.

(c) The continuing capacity of the city property to accommodate the applicant's existing facilities.

(d) The applicant's compliance with the requirements of this article and the lease agreement.

(e) Applicable federal, state and local telecommunications laws, rules and policies.

(f) Continued need for the facility in light of technological advances and current industry standards.

(g) Such other factors as may demonstrate that the continued grant to use the city property will serve the community interest.

(2003-07-17, Amended, 07/07/2003)

Section 21.2.24 Obligation to Cure as a Condition of Renewal

No facilities lease shall be renewed until any ongoing violations or defaults in the lessee's performance of the lease agreement, or of the requirements of these sections, have been cured, or a plan detailing the corrective action to be taken by the lessee has been approved by the city. In no event shall a facilities lease be renewed if lessee fails to cure.

(2003-07-17, Amended, 07/07/2003)

March 18, 2010

Observations and Questions Provided to:

Brad Townsend, Director of Planning and Zoning in Roswell, Roswell Mayor and City Council, Roswell Officials, and T-Mobile.

Prepared by:
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Submitted by a Citizens Group including Homeowners in/on Lake Charles Drive, Lake Charles Plantation community, Meeting Street community, Land O Lakes community, Creekside community, Maycroft Court, and others.

We ask for responses to each of the observations and/or questions posed, and for comment, in writing or electronic equivalent.

Issues:
T-Mobile
Site Selection—Question of conclusion
What alternate sites were evaluated?

A tax map analysis was provided as a part of the T-Mobile application as Exhibit A and is included at the end of this document. This provides Information regarding the search area and what parcels were investigated.

What alternate sites are available?

Was consideration given to Fellowship Christian School site, .3 miles from 740 Jones (fire station) site.

The Fellowship Christian School is too close to existing sites, as shown on the submitted

coverage maps, to provide improved service to the area in need.

What criterion was used to eliminate potential locations?

A variety of criteria are used to determine a property's potential as a facility location, one being proximity to existing T-Mobile antenna locations, and the ability to improve coverage in the area in need. Other criteria, includes, compliance with Roswell's code and property owner interest.

How was the Lake Charles Site established as the preferred location?

The proposed location meets the variety of criteria necessary to locate a new facility: It meets or exceeds the development standards set forth by the City of Roswell for telecommunications facilities, we have a willing landlord, and it is technologically favorable to satisfy coverage and service improvement objectives.

T-Mobile Contradictions—Please explain the disparity between T-Mobile's propagation maps, and—See "Exhibit B—Coverage Without Facility" Map provided by T-Mobile), and, T-Mobiles Marketing material—See accompanying Published Coverage Map for Voice Coverage, downloaded from T-Mobile Website

Which department is providing factual information?

(Observation—T-Mobile has fine reception at 1068 Lake Charles—Consistent with T-Mobile's published coverage map)

T-Mobile's Personal Coverage Check indicates the area around the proposed site location provides "moderate" and "good" service. The

web site's definition of "moderate" is "You should usually be able to place calls outdoors, occasionally in a car, but only sometimes indoors." The definition of "good" is "You will likely be able to place calls outdoors, in a car, and occasionally indoors."

The stated objective of this proposed site is to provide "In-building coverage in residential areas surrounding Jones Road, Shallowford Road and Woodstock Road in Roswell Georgia. It will also minimize dropped calls in the aforementioned area."

T-Mobile has proposed this location because there is a need to improve service to our customers, particularly where they use their wireless devices most: in their homes. As a business, T-Mobile has a responsibility to ensure our customers experience service quality they have come to expect. As more people drop their landlines every year in favor of using their wireless phone exclusively, and as more people use their wireless devices for Internet service, providing in-home service is crucial.

The two maps do not contradict one another. Although presented in different formats, they both reflect the same information: T-Mobile has a need to improve service to this area of the City of Roswell.

Please provide results of actual driving study showing service—ability to make and receive phone calls.

Please Provide FCC Rules and/or legal citations supporting the assertion that T-Mobile provide service inside home. Please provide case law, if available.

T-Mobile seeks to provide service in our customers' homes because they want to use their wireless devices wherever they are. People are accessing the Internet with their wireless devices more than ever. 60% of mobile phone calls are made from the home (USA Today, April 2007). We have a responsibility to our customers and our business to provide the best service possible, where people want to use it, and where they use it the most.

Please provide background information regarding T-Mobile's assertion that "This facility is a necessity as T-Mobile is responding to the demand of its customers, many of whom no longer use their land lines, but instead use their cellphones for everyday activities and emergencies." (See Accompanying "Revised Letter of Intent," Page 1—Part of T-Mobile's Application).

Please provide supporting documentation to support the assertion in the previous paragraph—especially those customers who no longer use their land lines.

According to the Center for Disease Control, in 2009 16.5% of Georgia households were wireless only, and 15% of Georgia adults were wireless only. 31% of adults ages 25 to 29 live in households that use only cell phones (RCR Wireless News, December 2007). Half of the U.S. residents who moved households in the last three months of 2006 did not reconnect their landlines.

T-Mobile is a business responding to the trends of the wireless marketplace and the demands of wireless customers.

Please provide record of every demand made within the area proposed to be affected

Please provide documentation regarding the number of T-Mobile customers within the area proposed to be impacted

Please provide Documentation on the number of T-Mobile Customers within the area proposed to be impacted that ". . . no longer use their land lines . . ."

Please provide any other information supporting this assertion

The information requested in the preceding items is proprietary. T-Mobile has a responsibility as a business to provide the best service possible to our customers; any other business providing any kind of service or product has the same responsibility. If ONE customer demanded improved service, if ONE customer will receive the benefit of improved service, T-Mobile has a right to request this permit, as outlined in the City of Roswell ordinance, in order to provide improved service.

Please provide any information support T-Mobile's assertion that this site, or one nearby, is necessary to provide E911 service.—Please provide information/ explanation of

Locating E911 caller utilizing time/and or angle to transmitter receiver, and,

GPS internal to the cell phone

Locating E911 caller using other

What percentage of T-Mobiles cell phones are delivered with GPS capability? (Not necessarily enabled for the user)

This site will provide improved access to 911. Because coverage indoors surrounding the proposed site is not available at every location, this site will allow more people in the vicinity to access 911 and other public safety resources, in turn making the entire community safer.

Please see the enclosed information page titled "Understanding 911" for a more technical explanation of the technology T-Mobile uses to provide enhanced 911. This technology is a network-based solution, which works optimally with at least three different antennas locations. Many factors determine the ease with which an emergency responder will find the caller dialing 911. The more antenna locations in proximity to the distress caller, the more accurately the technology will work.

T-Mobile also offers "3G" services to many locations across the country, the greater Atlanta area, including Roswell, being one of them. Customers using a 3G enabled phone may access 911 services through a handset-based solution, via built-in GPS. Today, the vast majority of T-Mobile customers still access the "2G" network, and as they replace their handsets over the years, they will migrate to 3G services and the accompanying GPS-based location services.

Please provide evidence of the impact of New T-Mobile Tower at Crabapple middle school on service in the area of 1060 Lake Charles

Coverage maps that have been submitted show the impact of the facility at Crabapple Middle School. Please see coverage maps

attached hereto. The Crabbapple Middle School is shown as 9AT1129C.

Please provide an explanation regarding how T-Mobile expects to meet the FCC Requirement to maintain power to equipment that provides service (Ruling post Katrina) Required by FCC rule—Provided in soft Copy to Roswell P&Z

This rule proposed by the FCC, commonly referred to as the Katrina Order, is no longer being considered, was never enacted, and hasn't been a consideration for at least a year.

Please explain the generator referenced in Notes on plans (See Accompanying—"Proposed Plans 2/10/2010" page 27, Note 2)—Why is it referenced?

Why is the Physical location of the referenced Generator not shown on plans

Why is the Location of Fuel Storage Tank, which per municipal code must be buried, not shown on plans?

There will be no generator at the site and the site plans have been revised to reflect this.

Please provide an Environmental Impact statement if available, and if not available, offer explanation why one has not been requested

There is no environmental impact study available. T-Mobile is not required by local, state or federal jurisdictions to provide an environmental impact study. We are required to perform a Phase I and NEPA/SHPO Study prior to any construction activities.

What are the expected impacts of disturbing the site?

The site plans and construction drawings that have been submitted provide the details and

limits of the construction of the proposed site. Approved erosion and sedimentation controls are indicated on sheet C3.4. These plans will be reviewed by the professional staff of the City of Roswell prior to the issuance of a building permit.

What are the expected impacts of Pollution by diesel smoke

What are the potential impact of a diesel fuel leak

What are the potential and expected impacts of burying a fuel tank

No longer applicable because there will be no generator on-site.

What are the expected and potential threats to the environment over time

What are the expected impacts to Migratory Birds and other wildlife? Please provide reference to independent studies showing impact.

The general consensus is that migratory birds are impacted by towers that are along coastal areas, exceed 200 feet, are lighted, and include guy wires. This site includes none of the above criteria: the tower is not near a coastal area, is 108 feet in height, will not be lighted, and will include no guy wires.

T-Mobile—Service Providers

How will T-Mobile access the MTSO?

T-Mobile will access the MTSO by utilizing the existing infrastructure available in the area. T-Mobile will access the current infrastructure as shown on Sheet E1 and E1.1 of the submitted site plans and construction drawings.

Does capacity of T-Mobile and other carriers exist to transport data to MTSO(S)?

Yes.

What is actual location of MTSO?

This information is confidential and will not be provided for security reasons.

Where will it be necessary to dig/trench?—Please provide statement from service provider

If digging/trenching is necessary, what is the impact of digging on Lake Charles or elsewhere?—Please provide statement from service provider

What is the environmental impact of digging on Lake Charles or elsewhere, if digging must take place?

The only digging required to access the current infrastructure is shown on Sheet E1 and E1.1 of the submitted site plans and construction drawings. There should not be any digging required on Lake Charles Drive by T-Mobile.

How will other carriers access their MTSO?

What is actual location of MTSO(s) of other potential carriers?

Where will it be necessary to dig/trench?—Please provide statement from every anticipated service provider

If digging/trenching is necessary, what is the impact of digging on Lake Charles or elsewhere?—Please provide statement from service provider

What is the environmental impact of digging on Lake Charles or elsewhere, if digging must take place?

Any future co-locators on this facility will access their respective MTSOs in the same manner as T-Mobile. T-Mobile does not and cannot speak on behalf of any other co-locaters beyond this general observation.

T-Mobile—Other—Please identify the engineering specification that prevents tower extensions greater than the minimum height required for the tower (Reference—Accompanying "Revised Letter of Intent," Page 8).

There are no engineering restrictions to increasing the height of the tower. If desired by the City Council, T-Mobile would accept a condition of approval that the proposed tower exceed 108'.

Would it be possible, from an engineering perspective, to raise the height of the tower, as was done at the Hembree Road site? If yes, would a rise in height require guy wires, lights, FM coloration, etc., or,

A raise in height would not require guy wires. Lights are not required unless the structure exceeds 199'.

Please identify the engineering specification, reference, or other, identifying that this tower can never be extended higher, by any means.

There are no engineering restrictions to increasing the height of the tower. If desired by the City Council, T-Mobile would accept a condition of approval that the proposed tower does exceed 108'.

T-Mobile—Other—Please confirm "user" in the context provided by T-Mobile—". . . the proposed tower

will be designed for a total of three users." (See Accompanying "Revised Letter of Intent," Page 8)

Please confirm that a "user" as T-Mobile applies the word, means cellular telecommunications provider, and please provide the frequency range of the proposed user(s). (This is noted, but not spec'ed.)

User is defined as any other wireless provider such as Verizon, AT&T, Sprint, Metro PCS and Clearwire. We have no proposed additional users at this time. Their frequencies ranges can be found at www.wirelessadvisor.com. Facilities are also capable of accommodating equipment used by municipalities, such as emergency responders.

Please confirm that no additional antennae will be added, by T-Mobile or other "users", or, T-Mobile will allow additional carriers on this proposed tower, this is encouraged by the City of Roswell.

Over time as technology advances and evolves, T-Mobile may upgrade its equipment at this facility, as it does all over the network. All additions and modifications are completed in total compliance with local, state, and federal laws and regulations. Any other carrier wishing to co-locate on this structure will also be required to comply with the same standards.

Please direct me to the page identifying the specifications of additional antennae, their appearance, positioning, etc.

Sheets C4 and C4.1 provide information regarding the placement of the T-Mobile antennas.

T-Mobile—Other

Who is responsible for the suitability of the proposed tower for this application since T-Mobile's Engineer, Walker Engineering, ". . . accepts no responsibility for the suitability of the tower to carry existing and proposed loads." (See Accompanying "Proposed Plans 2-10-2010," Page 12, note 1.)

Upon approval and as a part of the building permit submittal package, T-Mobile will provide stamped engineered drawings for the proposed tower.

Are detailed plans for the proposed tower available for review?

If so, please provide, and,

If not, why not.

There are no tower and foundation drawings available at this time. This will be produced at the time of the building permit submittal. Tower and foundation drawings are not required as a part of this application, and are provided at the time a specific facility is ordered and permitted.

T-Mobile—Other—Please provide references from municipalities/customers similar in nature and scope to that proposed.

We are in different phases of sites throughout the metropolitan Atlanta area and will not provide any information in regards to these areas due to the proprietary nature.

Why are other providers able to provide service from existing towers, and T-Mobile is not? Please Explain.

Although T-Mobile cannot and will not speak to the specifics of other carriers' network design and service levels, there are many factors that could affect a particular carrier's ability to provide service in a given area. Every carrier's network limitations are different. Capacity and customer load (the number of subscribers accessing the network at one time), and frequency are a few of the many impacting variables.

T-Mobile seeks to co-locate on existing facilities whenever possible, and is co-located on every surrounding facility nearest to this proposed site.

Please provide all information from residents complaining to T-Mobile about inadequate service in the area of 1060 Lake Charles.

Please provide Raw Numbers of complaints specifying the proposed area of additional coverage

Please provide All specifics of every complaint, including location from which complaint was made

Please provide any material, including voice recordings, supporting the complaints and number of complaints provided

The information requested in the preceding questions is proprietary. Similar to the response requesting information about the number of T-Mobile customers impacted, one dropped call or one complaint is too much: we have determined there is a need to improve service in this area to a level deemed acceptable by our engineers charged with monitoring the network. As a company we are certainly entitled

to determine the service levels we deem acceptable. We have applied for a permit with the City of Roswell in absolute compliance with the development standards set forth by the ordinance.

Who are the Parties to the proposed Lease, i.e., will it be T-Mobile South, LLC, or some other entity.

T-Mobile South LLC

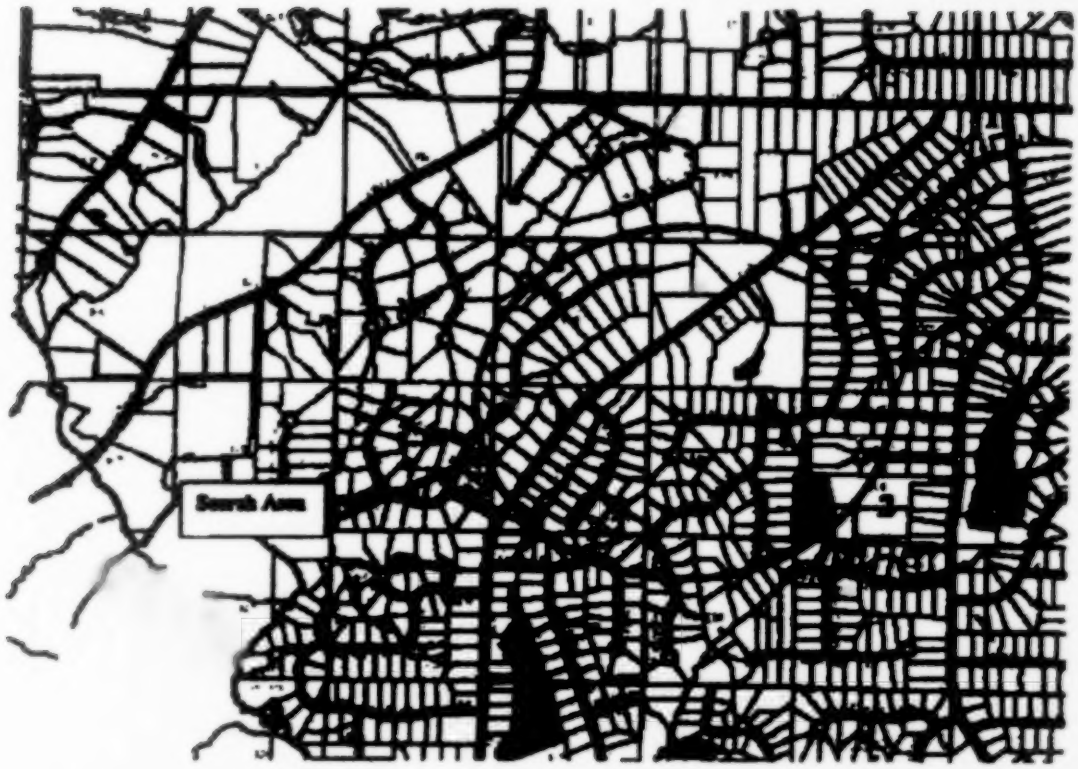
Please describe the relationship between T-Mobile South, LLC and parent company.

T-Mobile South LLC is the legal entity name for T-Mobile USA operating in Georgia. T-Mobile USA is a subsidiary of Deutsche Telekom AG.

Please Provide Financials for T-Mobile South LLC.

Information for T-Mobile USA can be found at www.t-mobile.com/Company

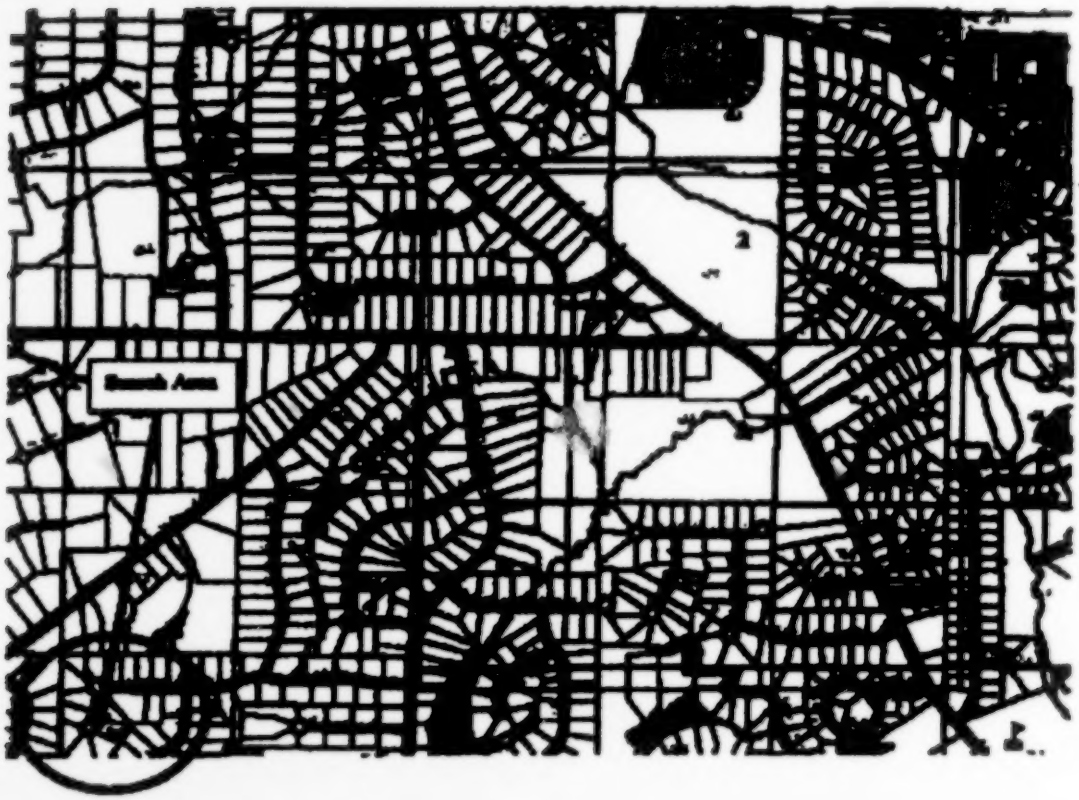
TAX MAP ANALYSIS



Search area is developed with single family homes and are zoned as such. Larger tracts within the search area are developed with single family homes and do not meet the intent of the City of Roswell code.

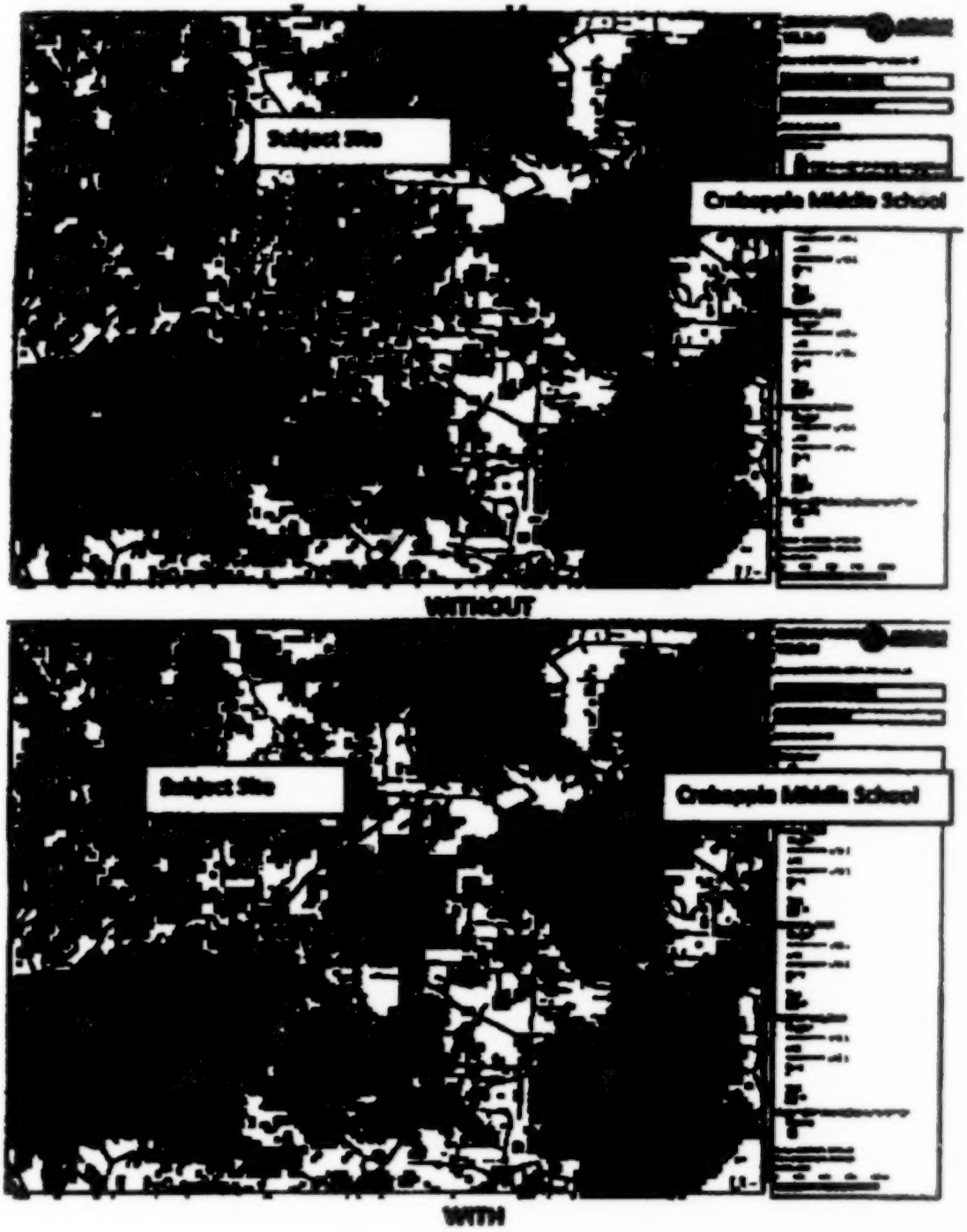
1. City of Roswell Fire Dept.—Although property established as a preferred facility location the proposal was rejected by City of Roswell.
2. Proposed location—undeveloped parcel.

TAX MAP ANALYSIS (continued)



1. City of Roswell Fire Dept.—Although property established as a preferred facility location the proposal was rejected by City of Roswell.
2. Property too far east to provide seamless, ubiquitous, and reliable coverage.
3. Properties too far east provide seamless, ubiquitous, and reliable coverage.

Coverage Maps with Crabapple Middle School Site



In The Matter Of:

Application of T-Mobile South, LLC, Lake Charles Drive

Proceedings, Mayor and City Council of Roswell, Georgia

April 12, 2010

Discovery
Court Reporting, LLC
4811 Galloways Farm Court
Acworth, Georgia 30101
Telephone (770) 596-0804
Fax (770) 529-7837
www.discoverycourtreporting.com
info@discoverycourtreporting.com

Original File 041210TMobile.txt

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[1] IN RE: Wireless Facility—T-Mobile South, LLC, Lake Charles Drive (adjacent to 1060 Lake Charles Drive)

PROCEEDINGS BEFORE THE
MAYOR AND CITY COUNCIL
OF ROSWELL, GEORGIA

April 12, 2010

7:30 p.m.

38 Hill Street
Roswell, Georgia

Maria K. McCune, CCR B-812

[2] APPEARANCES

Mayor and City Council Members:

JERE WOOD, Mayor

COUNCIL MEMBER JERRY ORLANS

COUNCIL MEMBER DR. BETTY PRICE

COUNCIL MEMBER KENT IGLEHEART

COUNCIL MEMBER KAY LOVE

COUNCIL MEMBER BECKY WYNN

COUNCIL MEMBER RICH DIPPOLITO

COUNCIL MEMBER NANCY DIAMOND (Recused)

BRADFORD D. TOWNSEND, Planning & Zoning Director

On behalf of the Applicant:

LANNIE GREENE

MARQUISE LEWIS

BEAU SIMPSON

[3] DR. PRICE: The first item on the agenda is Number 1, Wireless Facility, T-Mobile South, LLC, Lake Charles Drive, adjacent to 1060 Lake Charles Drive, and to present that, Brad Townsend, Planning and Zoning Director.

MR. TOWNSEND: Thank you, Dr. Price.

MAYOR WOOD: Council Member Nancy Diamond.

MS. DIAMOND: Thank you, Mr. Mayor. I am disappointed as I talk. As many of you know, I live directly in the path of this proposed cell tower, and in order to make sure there is no question of the motives of this Council and their vote, I am going to have to recuse myself.

I think you'll find pictures of my house on both sides of the presentation, and I'm disappointed to learn that that means I have to leave the room because I had lots of questions, but I just wanted to clarify that before we start.

MAYOR WOOD: You may recuse yourself.

Council Member Price, if you'll proceed.

[4] DR. PRICE: Mr. Townsend, please proceed.

MR. TOWNSEND: Thank you.

This is a proposed request from T-Mobile regarding an alternative tower structure to be located at 1060 Lake Charles Drive.

An alternative tower structure as defined—this is the definition—is a man-made tree or clock or bell steeple. It is to be camouflaged, within the opinion of Council, compatible with the area.

The proposed tower is to be located west of Lake Charles Drive, approximately 2.8 acres. The subject

property is vacant and zoned E-2, single-family residential.

The proposed tower is to be constructed in a manner to represent a monopine tree. These are similar examples of existing towers of single monopine trees. The structure is to be approximately 20 to 25 feet above the existing pine trees of the area.

This is a representation of our existing cell towers within the city of [5] Roswell shown by the red circles or the blue triangles. The proposal this evening is the yellow represented location. The circle around the existing towers, as well as the proposed one, is a 2500-foot requirement. This is what we utilize in determining collocation.

I'll let the Mayor finish his thought before I move on.

MAYOR WOOD: No, you may proceed. I just had a question.

MR. TOWNSEND: Okay. This is a representation provided by T-Mobile of the RF frequencies for the area, and the green areas represent where there are strong frequencies. The yellow areas are weaker frequencies. The gray area, they have less powerful frequencies in those locations.

The next slide is placing the tower in that location. You can see how the location of the proposed tower fills in the area represented by T-Mobile that they want to try to serve.

MS. WYNN: Can you do that one more time, please?

[6] MR. TOWNSEND: This is without the tower, and this is with the tower.

MS. WYNN: Thank you.

MR. TOWNSEND: This is a representation of the proposed location represented by T-Mobile showing the setbacks from the existing property line. There are homes on all sides of the proposed location.

This is an aerial photograph showing the existing homes as well as the parcel line and the proposed location of the tower.

Staff has received—I corrected the larger number but not the smaller number—over a thousand-plus e-mails, signatures, petitions, letters in opposition of the proposed location.

We provided you a small representation. We have the actual pieces of paper that includes each of those petitions in our files this evening representing opposition to the proposed tower.

The proposed tower that is being recommended by Staff, it is actually in an alternative location. If you look at this graphic, the blue square represents where [7] T-Mobile has proposed it. The red square is representing where Staff would prefer the tower to be located.

This moves it approximately 300 feet, about 250 feet to the east of the exist—or to the west of the existing of where they're proposing. This is a graphic representing Staff's recommended location showing it further to the west on the property.

The reasoning for the request to move that, it's Staff's recommendation that this location represents the person or homeowner receiving the greatest financial gain is actually also receiving the largest visual impact to the proposed tower.

This is an aerial of the proposal from Staff.

The recommended action of this evening is, Council is to make a determination with the alternative tower structure, if compatible with the surrounding area, and there would be recommendation that it be approved with three conditions, which we've included in our Staff report.

[8] They relate to the site plan requesting it be moved to the west, that they construct a black vinyl fence around the area on the ground, as well as they add additional evergreen trees to screen that location.

That is Staff's recommendation and report for this evening.

MAYOR WOOD: Council, any questions for Staff?

Council Member Dippolito.

MR. DIPPOLITO: Mr. Townsend, has the applicant addressed your suggestion of moving the tower?

MR. TOWNSEND: They have not.

MR. DIPPOLITO: Have you presented them with that information?

MR. TOWNSEND: They were given that information approximately a week and a half ago.

MR. DIPPOLITO: Another question related to that. What is the height of the trees in that area?

MR. TOWNSEND: All of the trees are anywhere between 80 and 90 feet tall.

MR. DIPPOLITO: So regardless of where [9] this would be potentially located on the property, it would be 28—

MR. TOWNSEND: Right.

MR. DIPPOLITO: —38 feet higher than any of the trees?

MR. TOWNSEND: Correct.

MAYOR WOOD: Any other questions, Council, for Staff?

At this time I would like to call upon our City attorney, Mr. David Davidson, to advise Council on where we were as far as the system and their discretion in this matter.

MR. DAVIDSON: Thank you, Mayor.

To begin with, the Telecommunications Act prohibits state or local governments from prohibiting the provision of wireless telecommunication services or from passing regulations that have the effect of prohibiting such services.

The federal law does, however, preserve local zoning authority. The City has the ability to talk about and decide the placement, the construction, and the modification of these facilities.

[10] There are some limitations to that bill and the City, though, in that they cannot discriminate against certain carriers or favor a certain carrier, and they cannot make it so onerous that it actually prohibits the provision of such service.

Federal courts have generally held that any ordinance that inhibits or limits the ability of any competitor to enter into a market violates the Telecommunications Act.

With that said, the City does have in its ability under our ordinance the ability to decide whether the construction of a facility is aesthetically compatible to

the surrounding properties. They can also decide that a height is too high.

They do not require collocation, and if they're trying to get a collocation and get three carriers on this site, then obviously that's going to be a higher tower than just T-Mobile would require.

Now, the ordinance also goes into in the past of favoring collocations so you don't have several towers popping up around the city.

[11] Basically, provided that if the company can show or demonstrate a need by the provision of this service in the area, the Council has the authority to decide the construction, the placement, and any kind of modification to the system.

T-Mobile has come forward before, as everybody probably knows by now, and tried to place a cell tower on the City property where the fire department is. That was rejected.

They are coming forward now with another site. There is a possibility for the denial of this site, that unless evidence shows otherwise, that could be seen as prohibiting the provision of service.

Now, I've heard comments both ways that there is service here, it's just not that great, so that's going to be something for this Council to decide.

MAYOR WOOD: Thank you, Mr. Davidson. Does the Council have any questions for Mr. Davidson?

At this time we'll hear from the applicant. If you'll give us your name and [12] address and who you represent before you begin.

MR. GREENE: Yes, sir. My name is Lannie Greene. My business address is 2470 Windy Hill

Road, Suite 346, Marietta, Georgia 30067. I'm here tonight representing T-Mobile South.

I also have with me Marquise Lewis, who is the RF engineer of T-Mobile. She can answer any technical questions you may have or why we need this location. She's actually going to come up and give a brief presentation.

I also have Mr. Beau Simpson here, who is here to answer any questions you may have on the property-valuation studies we've submitted.

I've been involved in site acquisition and permitting sites, acquiring sites for plus 13 years. One of the first steps we as site-acquisition or zoning folks do is, we go in and look at the zoning ordinance to determine what the requirements are by the particular jurisdiction that we're going into.

[13] We also look for other structures that may be available for collocation, which is encouraged by all—most jurisdictions.

That ordinance is written and adopted by jurisdictions to protect the quality of life, public safety, and property values for the residents of Roswell.

We took the City of Roswell zoning ordinance. We looked for a location that would meet our requirements and also meet your code.

The first location we discovered or chose as a candidate was the fire-station property, which was part of your—the City's 2003 Wireless Facility Siting Plan. We actually, I believe, proposed a 150-foot-tall structure at that location, and as Mr. Davidson stated, the City decided they did not want to move forward with that location.

We still have a need to cover this particular area. We went back to the drawing board, so to speak, and looked for additional properties.

Also, I've got one more thing that I'd [14] like to submit. This is a—I'll submit this to Mr. Townsend. There are some other large tracts located along Shallowford Road, and this kind of gives you a reason why we did not approach those properties, primarily just based on the development of those properties. Clearing and grading would be more significant at those locations, the way the houses sat on those properties.

The subject site is actually undeveloped, and there is no house on the particular lot, so I'm going to hand this to Mr. Townsend as part of the record.

As I stated, we reviewed the ordinance to find a candidate that would meet your requirements and would also meet the coverage needs of T-Mobile. As you're well aware, the target area and surrounding areas are zoned primarily residential.

More and more folks are using their cell phones instead of their land lines. It's imperative that we be able to cover these houses with this tower.

People rely on their cell phones for emergencies, and as the City recognizes [15] this, the NIXLE program that y'all now have where people can sign up and get texts or get e-mailed regarding an emergency event in the city of Roswell.

We're going to need to cover the residential areas, as well. People spend more time at home than on the roads in Roswell. This would actually be a part of that infrastructure so everyone that wants to can participate in the NIXLE program. It would be more—

NIXLE would be more effective if it was available to all the residents of Roswell.

There may be some folks in here tonight who say they have coverage with another carrier, and that's just fine. I see that as being shortsighted. That would be limiting the market. Competition—this is competition. Without competition, cell-phone rates would probably go up.

There may be some folks in this room tonight that have T-Mobile coverage and feel that it's fine. T-Mobile—in today's economic times, T-Mobile is not going to spend the money that is required to build [16] the site if there was not a need. There is a need for this particular site. I think we have provided quite a bit of information for you to take a look at showing the need and additional documentation for you to review in regards to this site.

And what I'd like to do now is have Ms. Lewis come up and give you some detail on the more technical aspects of this particular application.

MAYOR WOOD: Before you step down, does Council have any questions for Mr. Greene?

Thank you, sir. You may bring up Ms. Nichols.

MS. LEWIS: Good evening. I'm Marquise Lewis, and I'm at 400 17th Street, Suite 1131, Atlanta, Georgia 30363, and I represent the RF engineering group with T-Mobile.

And we considered quite a few bits of data in order to determine that we had a need in this area. In the area between Shallowford Road and Woodstock Road, T-Mobile is unable to provide reliable in-vehicle and in-building coverage to [17] residents and workers in

that area, and that's what we're seeking to do with this site.

We've actually considered quite a few options. What we try to do is when we're selecting a site and we're trying to optimally place a site, we want to provide continuous coverage to sites that are already in the network while also introducing minimal overlap, so that way we can minimize the number of sites and also the height of sites that we have to develop in that area.

The site that we're currently looking at is a 108-foot monopine structure, is actually a great placement for us in the center of an area around which all sides have that need, so we're placing it right in the middle of an area of need.

We have considered other options. We've considered sites that weren't placed as well, weren't as ideally placed, but we've looked at a high rad center at those locations, for example, the fire station.

I also understand that some of the [18] constituents here had some questions about what's called a DAS system, and that is an alternative way to provide wireless coverage in certain areas and certain situations.

However, when you consider the technical requirements for implementing the DAS and look at the topography of this area, we realize that that is not a viable option in this particular situation.

A DAS system, for example, generally is going to place antennas below 50 feet in height, and there are many antennas. There are low-powered antennas, and they almost require a line of sight to the area that they're providing coverage to.

So when you consider that and you look at this area, you think about its topography and the terrain, you have a lot of rolling hills and you have a lot of foliage, so it's going to be very, very difficult, if not impossible, to provide that line-of-sight requirement to implement a DAS system in the area considering the limitations that are in the neighborhoods that we're trying to cover.

[19] For example, if we were to try to use existing power-pole structures, that wouldn't work because there just aren't enough above-ground structures to provide the level of reliability that we're going to need to provide in the neighborhoods in this area.

And even if, for example, there were plenty more structures and we could place dozens and dozens of antennas on Georgia Power poles, we still have limitations that are imposed upon us by Georgia Power. For example, we cannot use a wooden power pole, so that actually takes quite a few of the power poles off the table that are above ground in the area. So a DAS system is just not a viable option for us in that situation.

So we've considered alternative locations, we've considered alternative technologies such as the DAS technology that many people inquired about, and we realized that we've actually arrived at the best solution for T-Mobile, and that is the 108-foot monopine located on Lake Charles [20] Drive.

Thank you.

MAYOR WOOD: Thank you, Ms. Lewis. Yes, sir? Mr. Orlans, do you have a question?

MR. ORLANS: This system you are referring to, it's called the DAS system?

MS. LEWIS: Yes. It stands for distributed antenna system.

MR. ORLANS: That what I've read that's called a microcell system, is that similar?

MS. LEWIS: It is.

MR. ORLANS: So that's what you're referring to?

MS. LEWIS: Yes. They are considered microcells.

MR. ORLANS: I wanted to clarify that.

MAYOR WOOD: Any other questions?

Yes, Council Member Dippolito.

MR. DIPPOLITO: Ms. Lewis, you stated a DAS is not viable. Is it not viable because you can't physically get it to work or it's just a more costly system that would be financially viable for T-Mobile?

MS. LEWIS: It is more, possibly, I [21] guess, but I'm just here from the RF aspect of it. As far as the RF perspective, the terrain, the foliage in the area is not going to allow us, with the structures that are in the area, to achieve the line-of-sight specifications that we need in order to cover the area via DAS, so I'm speaking only on the technical requirements here, and we don't meet those.

MR. DIPPOLITO: The question was, is it just not feasible to make it happen or is it just more expensive and something that you prefer not to do?

MS. LEWIS: With the current infrastructure, T-Mobile cannot achieve the level of reliability in the search area using the DAS system, so that is correct. It is not feasible for T-Mobile to obtain its objectives using the DAS system in this situation.

MAYOR WOOD: Any other questions? Thank you, Ms. Lewis.

MS. LEWIS: Thank you.

MR. GREENE: And I'd also like to add, too, the DAS microcells, those are more [22] favorable in a—such as a mall or an airport, a large facility such as that where DAS would more likely be used.

I just want to sum up that we have gone out, we have found a site that meets your code. We have designed a site that we feel is nonintrusive to the area. We've provided you photo simulations that, I think, show that.

One of the complaints we always get is, when we take the photos, take them in the fall, there's no foliage cover. In this particular case, there are no leaves on the trees. You can see pretty well that the photo sims show that there will be no significant impact upon the area.

And as I say, if you have any questions regarding the property-valuation reports, Mr. Simpson is here to speak to that, and we're asking that you approve this application. And I would like to reserve any time left over for rebuttal.

Thank you.

MAYOR WOOD: Yes, sir.

At this time we have representatives of [23] the neighborhood who would like to speak as an organization, and I'll begin with that organization by calling Mike Knighton.

MR. KNIGHTON: Hi, everyone. I'm Mike Knighton. I live at 580 Indigo Drive here in Roswell in the Lake Charles Plantation subdivision.

Mr. Mayor, City Council Members, Administrators, it's really great to be here. My, how these last five weeks have just flown by.

I also really feel the need to acknowledge a lot of people in the audience this evening who have helped out enormously in preparing this presentation for you this evening. There's a few people who are not going.to speak. I would like to say a special thanks to Ashley, Kim, Mike, Betty, and Wyatt and the presidents and members of various homeowners' associations in the Lake Charles area.

We're going to have several speakers. We hope to keep this brief but cover everything. We have people who are expert or are impacted who will be speaking on [24] various topics.

Christy Levine will be speaking right after me. She happens to be an attorney. She, lives at ground zero. I think she's going to give her views on the potential impact to her and also chat a little bit about the municipal code.

Ken Kavanaugh, who some of you may know, is going to speak. He has quite a bit of background in this, having gone through something similar 15 or 16 months ago.

Next will be my better half, Trudy, who has 30 years' experience in the telecommunications business. She's going to talk a little bit about how we got here and what will happen in the future.

Tish McQuillen will be chatting next. She is a T-Mobile customer, and she's going to chat about T-Mobile's coverage in the area.

Sherry Ward is a lending professional who will be speaking after Tish. I expect her to chat about the potential financial impact of this cell tower.

Trent Orndorf is not from the Lake [25] Charles area, but he lives here in Roswell. He lives in an area that he believes has been impacted, been degraded by a cell tower that was erected nearby.

And finally we're going to have Major Chris Buck, who he and his wife, Wendy, also live at ground zero, and they're going to—I believe Chris is going to chat about some concerns he has regarding health.

You know, two weeks ago, I have to admit, speaking in front of this group the first time, I was pretty nervous. So I thought just to make myself more comfortable, I would see if I could encourage a few of my friends to come and give me support.

Mr. Mayor, would it be all right if I asked a question of the audience?

MAYOR WOOD: Yes, sir.

MR. KNIGHTON: Anyone here who's opposed to this application like me, would you raise your hand, please?

Thank you.

I do feel quite a bit better this evening.

[26] (Laughter.)

MR. KNIGHTON: I want to say a special thanks because I'm to his part how Brad and Jackie have been absolutely fabulous for us, and I really appreciate the help that they've given us.

Trudy and I moved here six years ago. We moved here because we really liked Roswell. We love the

green trees, love the quaint downtown, like the bicyclists. We really like the overall quality of life.

It's my opinion that this group, City Council or this body, is responsible in a large part for the quality of life that we enjoy. We don't have barking dogs. We've got limits on boom boxes. You allow homeowners' associations to do something that I kind of like, and that is, you banned the flapping tighty-whities in the next neighbor's yard. I understand that there's something coming up about pot-bellied pigs. I've never seen one, but sounds like it might be a good thing. Somehow y'all are faced with the proposition of an 11-story cell tower going in a backyard in a [27] residential neighborhood.

I listened to Lannie, and I have to tell you, I understand what he's doing, it's his job, but nothing new has been presented. It's kind of the same stuff that we heard nonanswer answers, and we're taking wishes, and we're—I'm sorry—he's taking wishes and presenting them as needs.

There are Photoshopped pictures that he referenced superimposed on where they think the balloon will sit. I don't know where the balloon was because most of the time, you couldn't see it. I don't think they do, either, but they had guys running around taking pictures.

A picture, like they say, is worth a thousand words, and I'm hoping a short video will be informative for you, too. Mr. Townsend, if we can stop at 18 seconds.

I hope y'all can see the balloon there. Got a little oscillation. Beautiful day it was. Sky is blue. Oh, my, it's going down. Okay. How about there?

I don't know. If that's 108 feet, I'm missing something. It looks to me like it's [28] more like maybe, rough height, 10, 12 feet. If T-Mobile's proposing a tower at that height, I think we've got something different to talk about, but they're not.

And they described this—thank you.

They described this as, or maybe it's Mr. Townsend, as a stealth tower. And, you know, when I hear stealth tower or stealth technology, kind of reminds me when I was a kid, probably second or third grade, occasionally a teacher would pass out something, you had to find the hidden objects in the picture. It was a wrench or something like that.

First, I want to show you—first, I'd like to show you some pictures that were taken around the neighborhood. This is T-Mobile. That's their Picture Number 25 in the vicinity of 525 Indigo. That's about 60, 70 feet from my front yard.

And as you can see, they identified the balloon is invisible. Fair enough. Maybe it was down low where we saw it in the video a minute ago.

Coincidentally, we have 50, 60 people [29] running around taking pictures because we were all pretty interested. You can see the balloon there. We've got another one that essentially that's the same house, same general angle. We've got another picture that shows the balloon here on the right side of the house.

So ultimately I think there were some flaws in the balloon test. I wondered whether the balloon ever reached a total of 108 feet. If it did, it was only for a split second or two.

But I mentioned the pass-out where you get to find the objects, and this is called stealth technology, I

understand. I would like to do the same thing here and see whether you can find the cell tower in this picture.

(Laughter.)

MR. KNIGHTON: Well, I'll tell you, chose not to use—and I'm going to acknowledge this right now. We didn't use one of the Photoshopped pictures that T-Mobile presented for this application. This is the one that was at the Mountain [30] Park site, but I think the point is made. Does anybody need more time?

(Laughter.)

MR. KNIGHTON: Then I'm going to do the same thing with this picture. We searched around and found this. Can you find the cell-tower base station hidden behind the trees here? We think there's some real questions about the visual impact and blight that have been unanswered.

That will start things off, I think, for you.

At this point, Ms. Levine.

MS. LEVINE: Good evening, everyone. My name is Cookie Levine, and I live at 1064 Lake Charles Drive. The back of my property backs up to the proposed site on Mr. Sherer's property.

Most of you have been there, and if you haven't, I talked to you on the phone, and I appreciate you coming to look and see what it would look like if it was put there.

A while back I went up to Home Depot, and I bought a floor fan, you know, one of those tall models on a stand that you might [31] keep at home when the air

conditioning goes out or one room in the home just doesn't cool quite good enough.

So I came home with this fan, and I didn't need it right away, and I had to figure out where I was going to store this thing. Well, I didn't want to put it in the den. I didn't want to put it in the dining room. I don't have a basement. So what I ended up doing was putting this floor fan in the garage, and the reason I put it in the garage is because there are parts of my home that I want to keep pretty. And I think it's the same thing with these cell towers.

We've got commercial areas. We've got industrial areas. We've got places that it is more appropriate for them to be, and those are important economic areas of the city. But the neighborhoods, the residential areas, those are the heart and the soul of our city.

A lovely city Roswell is, and if you start slicing and cutting into the residential areas of the city, I think it's going to mess up something, and you just [32] might not ever be able to get it back.

I don't think I'm any different from any of you up there or anybody else in this room. When we go home at night to our neighborhoods and our homes, whether we sit on a porch or a deck or whatever we do, that area that we see is our little piece of heaven, and I think it's that way for all of us.

And this is where we go to replenish ourselves, to fill up again so that we can go out the next day and fight another day, whatever battles, work, or whatever we have to do.

And I want to suggest to you that the neighborhoods, the residential areas of Roswell are the places that we

need to keep looking pretty. And now 1 would like to talk to you—

(Applause.)

MS. LEVINE: Thank you. You guys are awesome.

And now I'd like to talk to you for just a moment as a lawyer. Can we blow that up? I have read what Mr. Davidson was [33] referring to. It's nice to meet you. I have read the federal statutes. I have looked at that. I have looked at the ordinances. I 've looked at some of the zoning, and here's how I see it.

I think Mr. Davidson is certainly correct that you cannot keep the cell towers out. They have to come in. You can't just arbitrarily say no way. But absent that, as Mr. Davidson said, you have an enormous amount of say-so and control over the placement, the zoning ordinances that are most appropriate and relevant for you to take into account, and you have say-so over the placement and where these things go and how they're constructed.

And what's really important to look at is a step-by-step process, in my view, as to whether or not your decision in this matter is reasonable.

If there is a substantial amount of evidence that will underlie your decision, and if it is found to be reasonable, then that's what I think is important here.

And when this thing first came up, the [34] first thing I did was go and look at the telecommunications, the standards for wireless-communications facilities under the Roswell ordinances, and I don't think we need to go any farther than the purpose and intent.

I've said this before. I really love these ordinances and the way they're written. They're not full of

legalese, anybody can understand them, and there is a spirit to these ordinances that really says a lot.

And if we can just take a look at this here, the purpose is to establish guidelines for the siting of all wireless-communication towers and antennas, which will encourage the development of wireless communications while protecting the health, the safety, the welfare of the public, and maintaining the aesthetic integrity of the community. That says a lot right there. These are the neighborhoods. The goals: to protect residential areas and land uses from potential adverse impact of telecommunication towers, antenna support [35] structures, and wireless-communication facilities; to minimize the total number of towers and antennas within the community; to locate telecommunication towers and antennas in areas where adverse impacts on the community are minimized; to encourage the design and construction of towers and antennas to minimize adverse visual impact; to avoid potential damage to property caused by wireless-communications facilities; and next, under little F, to preserve those areas of significant scenic or historic merit.

I think these are very purposeful ordinances. I think what you have to look at and consider is, you've got two elements of this. You've got the aesthetic impact, and you've got potential adverse damage to the property. People who come after me are going to discuss the potential adverse impact.

If you make your decision based on the aesthetic inappropriateness of the placement plus adverse impact on the properties, then the basis of your decision is reasonable. [36] And I cannot imagine any jurisdiction in the country or any trier of fact who would feel differently.

I thank you very much. You've all been quite responsive to me when I contacted all of you, and I appreciate that, and I wish you the best of luck.

(Applause.)

MR. KNIGHTON: Ken Kavanaugh.

MR. KAVANAUGH: Mr. Mayor, City Council, thank you for listening to us this evening on some very important issues to your community.

My name is Ken Kavanaugh. My wife, Betty, and I have lived in Roswell for 22 years and lived at 1305 Lake Charles Drive. I'm a commercial real estate consultant, broker, investor, and author, as well.

Like many of the neighbors that fill this chamber tonight, my wife and I oppose the T-Mobile cell-tower application at 1060 Lake Charles Drive.

We hope that after you hear our community's strong objections against the construction of the tower in our [37] neighborhood that you will judge fairly our evidence and deny the application.

The focus of my comments tonight deal with case law supporting cities that have been successful in denying cell-tower permits. I have to add, I may be a little mixed up with Cookie, she's the attorney, but here I am. So although I'm not an attorney, I have served jury duty.

(Laughter.)

MR. KAVANAUGH: While deliberating these regulations of the telecommunication industry, the Telecommunications Act of 1996, which we all are hearing a lot about these days, Congress had the wisdom to foresee the need to give local jurisdictions the power of maintaining reasonable influence over

zoning, location, and siting of proposed communication towers.

Sort of restating some of what David covered earlier, Section 704 of the '96 Act preserves local-government zoning decisions. However, the section also limits the state and local governments of what you can do.

The telecom industry has been known to [38] go to court if their applications are denied. I would like to make a point here tonight that they don't always win.

The telecom industry tends to litigate, based on my research, on no substantial evidence to support the municipality's denial, unreasonable discrimination, i.e., favoring one carrier over another, prohibition on cellular services, and procedural errors by the municipalities.

I submit that we are providing testimony tonight that qualifies as substantial evidence. Also, the denial of the subject application would not rise to the level of unreasonable discrimination against a particular wireless carrier.

Roswell has allowed approximately 30 locations for communication antennas, and there are 67 communication towers within a 4-mile radius of Lake Charles Drive, thereby eliminating the argument of prohibition of cellular service in our area.

Roswell's system of records, transcriptions, and written notices provide reasonable written records to T-Mobile. Key [39] reasons this nation's courts have upheld the denial of cell-tower applications include zoning; aesthetics as they impact the community; testimony about loss in property value, which you will hear tonight; and safety concerns about the towers falling.

As an example, I would like to refer to two cases that were settled in favor of the cities. Also, the Supreme Court has ruled unanimously that telecom companies could not sue municipalities for monetary damages for refusing to permit a cell tower.

A U.S. Court of Appeals of the Eleventh Circuit, which has jurisdiction over Georgia, had a case. The U.S. District Court for the Southern District of Florida ruled in favor of the local zoning board in the Village of Wellington saying the board did not improperly reject the application of a wireless agent in 2003.

The application was for a 120-foot monopole with antenna concealed inside to be built in the village's golf and country club within a residential community.

At a 2003 meeting, the village, after [40] hearing the residents' objections, refused to issue the construction permit. The residents' primary objection was what the impact of the pole would have on housing values.

The residents testified they would not have purchased their homes in that location if the pole was present. A local realtor testified that the cell tower would adversely impact home resale values.

The wireless agent from Metro PCS sued the Village of Wellington. The District Court held that the village did not violate the Telecommunications Act.

The wireless agent then appealed the ruling to the U.S. Court of Appeals for the Eleventh Circuit. Among his arguments was that the village denial was not supported by substantial evidence as required by the Telecom Act.

In May of 2005, the Court of Appeals affirmed the District Court's decision. A key element of their opinion was that aesthetic objections coupled with

evidence of adverse impact on property values and [41] safety concerns can constitute substantial evidence.

The second case I would like to cite is U.S. Court of Appeals for the Fourth Circuit, which is in Virginia. In 1997 the City Council of Virginia Beach voted unanimously to deny the application of AT&T Wireless and others for a conditional use permit to erect two 135-foot communication towers on a Methodist church's grounds.

The Planning Commission unanimously voted to recommend the approval. The City Council, after receiving over 700 signatures and testimony opposing, denied the application.

The applicant sued in District Court and won. The City of Virginia Beach then sued in U.S. Court of Appeals. The Appeal Court reversed the District Court's ruling primarily based on the following grounds, and I quote:

"In addition, the evidence shows that the opposition to the application rested on the traditional basis of zoning regulations, preserving the character of the neighborhood [42] and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result," unquote.

One more quote. "In all cases of this sort, those seeking the bill will come armed with exhibits, experts, and valuations. Appellees, by urging us to hold such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens, that is, to thwart democracy.

"The District Court dismissed citizen opposition as generalized concerns. Congress, refusing to abolish local authority over zoning for personal wireless services, categorically rejected this scornful approach."

We're not against cell towers. I bet almost everybody in here has a cell phone somewhere, and we would like to, I'm sure we are all pressing on you, that we are defending our neighborhoods from the [43] encroachment of commercial and industrial uses.

One more little point at the end here. Mike asked me to comment on migratory birds. The U.S. Fish and Wildlife Service estimates between five and fifty million—little loose on the numbers there, but five million is pretty good—birds are killed in the U.S. each year in collisions caused by telecommunication towers.

The U.S. Court of Appeals recently issued a ruling ordering the FCC to evaluate the potential adverse effects of communication towers on migratory-bird populations of the Gulf Coast region and the United States. The FCC is renewing their regulations to consider the environmental impact of these towers.

Thank you for your attention.

(Applause.)

MR. KNIGHTON: Now my better half, Trudy, Trudy Knighton.

MS. KNIGHTON: Hello. My name is Trudy Knighton, and I live at 580 Indigo Drive in Roswell, Georgia.

[44] As Michael mentioned, I've been in the telecommunications business for over 30 years. I've been on the side that we call the wireline side, as well as

wireless, and I have actually read the Telecommunications Act of 1996.

I thought you might benefit tonight from understanding a little bit of the history of T-Mobile, where they started, where they came from. The wireless/cellular industry has always been kind of a crazy place, tumultuous, a lot of acquisitions, a lot of spinoffs, a lot of consolidations, and T-Mobile in their origin is not unlike the rest of those companies.

T-Mobile began as a company called Western Wireless out of Bellevue, Washington. They were a carrier that specialized in providing cellular service to the rural community.

Ultimately, though, they were spun off, and then they were acquired by Deutsche Telekom in 2001. Deutsche Telekom, not surprisingly, was formed from the former German state-owned monopoly Deutsche [45] Bundepost, so, and interestingly enough, the German government still owns a sizeable stake in the parent company.

You might ask, so what? What does this mean to us? Well, I just find it interesting that a German company is using U.S. law against us to further their own business pursuits. What can they possibly care about our neighborhood or our town or our quality of life?

Frankly, every couple years there's an article about the possible spinoff of T-Mobile from Deutsche Telekom because of their lagging sales, their lagging customer acquisitions. Might they not just be building more cell towers to shore up their business for sale? Sounds like it could be likely to me.

Let's talk a little bit about market share. T-Mobile is the fourth largest carrier in the country, and right now we've seen that they have anywhere from three-tenths of a percent to 10 percent of market share depending on who you talk to.

We tried to find out from T-Mobile how [46] much market share they had, but they won't tell us, so we took a scientific poll. We polled the attendees of the Planning and Zoning meeting a couple weeks ago. There were 104 people there from the neighborhood, and we asked them who had T-Mobile service. Three people raised their hand. Three percent?

If you extrapolate that to Roswell at large, we have 90,000 people in Roswell according to the census, and let's assume that every man, woman, and child has a cell phone, and that means infants. Everybody has a cell phone. That's roughly 700 people in the city of Roswell who have T-Mobile service. Take that just a step down. Narrow it down to our little neighborhood. How many people are there? We're talking about putting an 11-story cell-phone tower in a neighborhood to serve a handful of people. Seems kind of absurd to me.

T-Mobile is relying upon the Telecommunications Act of 1996 as a basis for this proposed tower. It's interesting, though, the Act says that wireless carriers [47] have to provide service in cars. It doesn't say anything about service in homes, and it doesn't say anything about data service. That's just a T-Mobile wish.

Then they talk about 911. T-Mobile is saying they need a tower to provide this service. Okay. Fair enough. There are a couple ways to provide 911 service.

One is to use three cell towers to basically triangulate the cellular caller's location. That's what T-Mobile wants to do.

The other is to use GPS, and what that means, you've got to have a handset that's GPS capable. That is the other method. It is the more superior method.

You know, it's kind of interesting, I think it might be cheaper to equip every T-Mobile cell-phone owner with a new handset with GPS than to put up an 11-story tower.

(Applause.)

MS. KNIGHTON: Another concern we have is the Katrina Rule. This rule was put into effect after Hurricane Katrina, and it said that cell-phone providers had to maintain power to the towers in case of a general [48] power loss.

The rule was in force, but it isn't any longer. It's on hold. The cell-phone providers had a little difficulty with the language. That language is being rewritten, but we're pretty sure that this Katrina Rule is going to come back in some way, shape, or form.

And what means is that T-Mobile would have to provide continuous power maintained service from this tower in the event of a power loss.

Now, that means to me, it means a generator. It means a diesel generator. It means diesel fuel. It means diesel storage. It's not on their diagram today, but you can darn well bet it's going to come back.

You know, it's real interesting, you know, they're so concerned about providing 911 service, they don't have backup power to this tower that they're proposing right now.

What happens to 911 when we lose power in the Lake Charles neighborhood? Frankly, for everybody who lives in that neighborhood, we lose power when the wind [49] blows. I mean, seriously.

(Laughter and applause.)

MS. KNIGHTON: You know, finally, technology is an awesome thing. It's moving fast. It's moving faster than I've ever seen it, and frankly, folks, I have been in this business a long time. It's hard to stay on top of it, and it's awesome.

Everything is becoming miniaturized. I mean, we bought a new television two weeks ago. It took four guys to move this monster out of my living room. We replaced it with a big old screen that I can take and move anywhere in my house without even, you know, stressing about it.

I've got a PDA on my desk, a BlackBerry. I can do everything on this PDA that I can do on a laptop. That 10- to 15-pound brick I tend to carry around everywhere, I can do it now on a PDA.

Cell-phone service is no different. It's not ten years from now that the cellular technology is going to be there to go small. It's coming fast. AT&T just announced the Gizmo for 150 bucks a month. [50] You can put it in your house. It's like having a mini tower right in your house, and you're going to have awesome service. Where's T-Mobile with this kind of technology? Why aren't they out there with it?

You know, and finally, what happens when technology evolves? It evolves fast. And a couple years from now, five years from now, ten years from now, those cell towers are obsolete, and those carriers don't care about them anymore, and the weeds start

growing up around them, and the cell towers start to rust. Who's going to take those out? We're just going to get to live with those forever and ever.

So I thank you-all for listening, and I'm really opposed to this cell-phone tower going into our neighborhood.

Thank you.

(Applause.)

MR. KNIGHTON: Tish McQuillen.

MS. McQUILLEN: Thank you.

My name is Tish McQuillen, and I live at 2 Me[illegible] Street, Roswell. And I'm not [51] as well-spoken as my friends over here, so I'm going to read my statement, and you'll be very glad that I read it as opposed to rambling.

(Laughter.)

MS. McQUILLEN: Mayor Wood, Council members, good evening. There are a few things I'd like for you to know up front. I've been a resident of Roswell for over six years, and I'm retired from the banking industry for over 12.

And according to Google Earth, I live approximately 250 yards from the proposed T-Mobile cell tower right out my front door. And I've been a T-Mobile cell-phone customer here for five-plus years, and I have always had excellent reception on my T-Mobile cell phone.

Approximately five weeks ago, I became aware of T-Mobile's application to place a cell tower at 1060 Lake Charles Drive, and in that application one of T-Mobile's many claims is that their customers experience a loss of cell-phone coverage in our area,

and it says T-Mobile conducted what is known as [52] a drive study that supports their claim.

Well, when I read this, I thought, wow, the gap in coverage really must be extensive for T-Mobile to be spending six figures or over six figures, who knows, to install a cell tower. So I decided to conduct my own drive study to see where these huge gaps in coverage were.

To do this, I armed myself with my very specialized equipment: a map; a ruler; a Number 2 pencil; a cup of coffee, Starbucks; and my T-Mobile cell tower—excuse me—cell phone. And I drove within a 5-mile radius of my home for approximately two hours and covered approximately 46 miles using my T-Mobile cell phone.

Additionally, I made phone calls from inside my home at 2 Meeting Street. Excuse me. My findings are in the affidavit submitted to City Council, and my findings are simple. I did not drop one phone call, and the coverage was clear the entire time.

As a T-Mobile customer, the results of my drive study tell me that T-Mobile has excellent coverage in a 5-mile radius of [53] 1060 Lake Charles Drive, and so I would suggest—and I would love to be able to hand a green crayon to the gentleman from T-Mobile and tell him that I would like to cover in this map because I think there's great coverage there.

I will admit, however, that there are obvious issues with my study. I didn't enter each and every home along the 46 miles and test my coverage. Nor did I make 911 calls from those houses which, of course, I'm sure you're glad I didn't, and I used very unsophisticated equipment. But to me, isn't it the

point of coverage as simple as whether my cell phone works or not?

If there are small pockets where gaps in coverage exist, I say that they are very, very small. And as you know, there are many alternative and less-expensive solutions available to telecom companies to provide coverage and to fill gaps.

I have a brother-in-law that's one of those smarties. He happens to be a Ph.D. in physics. He worked for the government for 30 years in telecommunications and now [54] teaches telecommunications at George Washington University in D.C., so I've had some conversations with him over the past five weeks, as you can well imagine.

I asked him this side and that side, and he tells me that the future—that's my question: What is the future? And he says it's the microcells. That is the future; that's where it's going. So I trust him. He's a smarty, and he knows what he's talking about.

So the question is, so why aren't they using these alternatives, and what is the action against our neighborhood really about?

Well, is it about forging technology, wi-fi? Is it about T-Mobile shoring up their inferior technology? Is it about a foreign entity building a franchise to sell out in a few years, or is it about money?

What we do know, it isn't about the company providing cell coverage for their customers in the Lake Charles area, as T-Mobile's application claims.

Let's face it. Over the last 17 [55] months, the Lake Charles area has been under siege by T-Mobile. If it doesn't work here, let's try down here. You know, if it doesn't work there, well, you know, we're going to try

down here. And based on this pattern, we know this will continue.

We have 1,011 citizens that signed the petition, hundreds in red shirts, and one to two or three citizens that may have sent you e-mails and maybe made a couple phone calls.

We implore the City Council to protect our residential communities and all the residential areas throughout the city.

I personally decided to have faith in my City Council. I have faith that you will have our best interest at heart during this vote, that you will protect my neighborhood from these commercial structures, that you will develop a plan to answer our technology needs that doesn't involve a tower in a residential area, and that you will not let another neighborhood in the city of Roswell go through what the citizens of the Lake Charles area have had to go through over the past 17 months.

[56] In reference to the balloon test, I saw the balloon. It was 20 feet above the treetops, and it stood there for the time it took for me to run back into my bedroom, grab my camera, and run back out, and it was gone again. I'm guessing that was three minutes.

From that period of time that it was above the trees, it never reached the trees again for the entire test time, so I don't think the test was valid.

I will see the tower from my front door, and I will see it every day I walk out in my front yard.

Again, my name is Tish McQuillen. I am adamantly opposed to the cell tower, the first on residential property anywhere in Roswell.

Mayor Wood, Council members, thank you.

(Applause.)

MR. KNIGHTON: Next will be Sherry Ward.

MS. WARD: Good evening. My name is Sherry Ward. I live at 600 Oakstone Drive right around the corner from the proposed [57] location. I'm a mortgage banker with the largest residential lender here in metro Atlanta. I'm a native of metro Atlanta, as well.

I'm strongly opposed to the proposed location at 1060 Lake Charles Drive and any residential neighborhood location, and I want to tell you why.

As part of my job, I deal with residential appraisals on a daily basis. Essentially, a property will be assigned a value based on things such as square footage, number of bedrooms, upgrades, location, and the view that that property will have. I'm going to come back to the view here in just a moment. They're also based on what homes that are similar to that home, will be called comparable homes or comps, have sold for within usually a 1-mile radius and usually within the same neighborhood or subdivision.

For the purpose of a mortgage, we look at homes that have sold within the most recent six months, those that have sold most recently working backwards. If you can't [58] find enough homes within the recent six months, we'll go back as far as 12 months and use that data for our analysis.

When you mention view, homes that have what is considered a superior view are going to seek a higher sales price and higher sales value and appraisal value. Those with an inferior view are going to seek a lower sales price and lower appraisal value.

A superior view would be things like view of mountains, view of a lake, view of the woods, things like that, depending on where you're located.

For those of us in the Lake Charles area, some people could advertise—if they're listing their home for sale, they could advertise they've got a view of the lake. Others could advertise they've got a wooded view, creek, pool in the backyard, all sorts of things.

Today we're here because we've got the option to discuss whether or not we get to advertise a giant cell tower in our yard.

(Laughter.)

MS. WARD: So for some of us, that [59] might be a good thing. Others of us, it's not a selling point, doesn't really invoke the same kind of tone or sales factor that the lake with cute little ducks does, so I guess you kind of get the point there.

So what happens when you have something like a cell tower in your yard, something that we consider ugly or unsightly or unappealing in view of your home, people are going to buy a home that has the lake view. They're going to buy something with the wooded look.

That home that faces the cell tower is going to sell for less, and that's if it sells at all. Those people that have that home, if they have to leave—and people do have to sell their homes. They get job transfers. People get sick. They need to relocate. People get divorced. Things happen. They can't sell for what they needed to. It may go into a short sale. It may go into foreclosure.

When you see short sales and you see foreclosures, you really have a problem. It may sound dramatic, but it's reality. I see [60] it every day. I get phone calls

every day from people that can't sell their home, they can't even refinance their homes because they're upside down. They owe more than it's worth. They may not be able to sell it for what they paid for it a few years ago, and it's heartbreaking. It's very, very, very sad, and there may be nothing wrong with their home. It may be a beautiful place, perfect home, great school district. They may not have a cell tower that they have to battle with, and they already have an issue.

You add a cell tower to the mix, it's a hopeless situation. Power lines, anything like that, it's just a bad situation, and it doesn't make sense.

Buyers today are extremely picky. I've got two customers I'm working with right now. They wrote contracts, binding contracts where they put down earnest money. They paid for home inspections. This is an expense, and people are tight with money today.

They paid for those home inspections, [61] went through the entire process, and changed their minds, backed out of the contract, and I'll tell you why.

The first customer decided that the house sat too close to the neighbor's house. That house was sitting there the entire time. The house didn't get up and move. It was there, didn't go anywhere.

Now, I've done my job. I did all my work. I was a little frustrated. Agents get a little frustrated, but that's our job. So if you don't think that person's going to think twice about a cell tower, think again.

The second customer decided their house was too close to a highway. I can hear the cars. I can hear the cars at night. I'm never going to sleep. I don't think I'm going to be able to resell this house. Somebody else

buying this house is going to think it's too close to the highway, too.

They did the same thing, earnest money, paid for inspection, backed out of that contract. Buyers are picky. They're not going to buy a house next to a cell tower, not in this market, not when there are other [62] houses to chose from.

Just so you don't have to listen to just my opinion, I also solicited the opinion of a real estate professional here in metro Atlanta. I asked Todd Roseberry, who is also a native Atlantan. He's been in the business of real estate for 16 years. He's the owner of multiple Keller Williams real estate offices and has managed an office with over 100 agents for six years.

I'm going to quote him here. To quote Todd, "Cell towers kill, your neighborhood values, that is. The median price drop from a cell tower in a residential district will be between 5 to 35 percent per home on average. The homes closer to the tower will have a higher depreciation, and the homes a quarter to a half mile will be lesser.

"You can argue all day long with whether cell-tower transmission does or does not affect someone's health. We have been doing this since the seventies with power lines. You'll find endless and very compelling research that will prove that there is or is not a health effect, and I [63] promise you, the results of each study will depend, A, which side you're on and, B, who's selling what.

"The bottom line from a real estate valuation perspective is the old adage, perception is reality. Buyers perceive a health threat with transmission towers, whether the threat is real or not. In addition,

they're ugly. It's America. Like it or hate it, ugly doesn't sell."

(Laughter.)

MS. WARD: "In the current market, some homes affected won't sell at all. Those would be homes within an immediate proximity and/or visual range. These homes will not be a saleable commodity in this market until the market stabilizes.

"It's common sense. Why buy near a tower when there are hundreds of comparable choices not near a tower? Specifically, in the 30075 ZIP code, 30075, in single-family homes, the average supply in the first quarter 2010 was a 13-month supply."

And what he means by supply, the amount of homes that are listed for sale versus the [64] amount of people available to buy those homes.

"A stable market is a six-month supply or less. Roswell is two to five years from that number when you're talking about all of Roswell as a city.

"Your home is not close to the proposed location of the tower, you say, and you think you won't be affected. Think again. Scenario, there will be homes—homeowners within the affected area that will have to sell.

"Job loss, death, divorce, relocation, those that must sell will, and usually that means a foreclosure. Bank-owned properties sell for 25 to 50 percent or less than average on market. Okay. Now, that means it's time for you to sell. You get a contract, but guess what, it doesn't appraise. Your deal dies, and now you have to reduce your price. Transmission towers equal lower home values."

That's what Todd had to say.

I have one last question for you. As of March 31st, in the 30075 ZIP code, there [65] were 445 homes listed for sale, and your house sits next to that cell-phone tower, and you're the one house listed for sale that sits next to a tower. What do you think your chances are of selling that house if you're one out of 445 next to a tower?

That's all I have to say. I'm against the tower.

Thank you.

(Applause.)

MR. KNIGHTON: Trent Orndorf doesn't live in the Lake Charles area, but he's got a perspective that I think might be worth you-all hearing. Trent?

MR. ORNDORF: Mayor Wood, City Council, fellow residents, just in the interest of full disclosure, we do not have a cell tower in my neighborhood. That keeps being told, but in the neighborhood we would be square where the threat of the cell tower was.

You remember a couple years ago. I don't know if you remember that time frame, 2003, 2004, but my name is Trent Orndorf. I live at 180 Worthington Hills Trace Drive in Roswell, Georgia.

[66] Came here in 2001 with the U.S. military, my wife and I. We both were active duty, actually showed up here, were shown the housing area down in Fort McPherson, about had a heart attack, and discussed driving to Fort Bragg, North Carolina, so I could go back to the 82nd while on duty there and find a place to live.

And we had a real estate agent call us from up here in Roswell. They said Roswell is like 30, 34 miles away. We'll look. We're not living down here. So we

drove up to Roswell, fell in love with the place, found a nice little neighborhood. Price was good.

We figured we'd turn around, sell the house when we got orders to go somewhere else—with the military it happens all the time—and just decided we wanted to stay, and we both got out.

We have two kids. We live in a fantastic neighborhood, and we had the threat of the cell tower. We had a homeowners' association. We had discussions [67] with the homeowners' association how we were going to fight against it.

In one month, 35 homes went on the market in our neighborhood. Out of that 35 homes, almost every single one of those residents put their home on the market because they were scared to death what was going to happen when a cell tower came up and they were going to lose the value of their property, so they made the decision to put it on the market ahead of time.

The entire summer, at least 25 to 35 homes were on the market every single day. That neighborhood went from being a nice middle-class neighborhood to now—we talk about views. My view is now chickens, not always alive, dead chickens sometimes, garbage, vehicles, all kinds of junk that you can't even believe.

I spend more time calling the City asking for clean-up. I drive out of my neighborhood, I see gang graffiti. I see drug deals. That's also coming from a Roswell Fire Department member. I'll leave his name out of it, but he has talked to the [68] chief of police several times about the drugs deals that occur both in front of his house and behind his house.

That neighborhood is tanked to the point that right now my wife and I are looking at losing seventy to eighty thousand dollars in our home to get out of that neighborhood. We are really, really disappointed in what happened to that neighborhood.

When I came in here, we were doing the confirmation for Milton County two weeks ago, and I heard them speak. I approached them afterward and said, I'd like to tell you what happened to me just on the threat of a cell tower, just a threat.

I'm telling you, they can say whatever they want to do about property values not going down. We experienced it. If you want to experience it, come on over to my neighborhood. Come at night one time. It is a disaster.

And I know what gang graffiti looks like, and I know what drug deals look like. I've been around the block more than once. [69] I'm telling you, we will be out of that neighborhood.

If we can't find a decent home in the Roswell area, we're gone. We'll leave Georgia, and I'm extremely disappointed in that. I really—as much as I love Texas, never thought I would be going back, but we are really seriously considering that now.

So I would suggest to you that you—recommend, suggest you listen to me. Deny this application. Allow these people to keep their residence in a decent—allow them to keep their property values and keep this city pretty. That's why we stayed, and thank you for your time.

(Applause.)

MR. KNIGHTON: Major Chris Buck.

MAJOR BUCK: I know it's getting late, so I'll keep it brief.

Mayor Wood, City Council members, my name is Chris Buck. My family and I reside at Maycroft Court, less than 300 feet from the proposed cell-phone-tower location.

My family I moved to Roswell in 2005. I'm blessed to have a wonderful 3-year-old [79] daughter, Emily, and an equally wonderful 6-month-old son, Daniel.

Wendy and I feel extremely fortunate to be able to raise a family in such a wonderful community with excellent schools, abundant parks, and many other places for a growing family to spend its time. I know that Mayor Wood and the City Council members have devoted much time and effort into creating and nurturing such a community.

I'm here tonight as a concerned parent and resident of Roswell because I think we are about to take a step off the track we are on and potentially make a decision that would hurt our community.

I'm deeply concerned because I do not want my children or the children of anyone else to grow up less than 300 feet from a cell-phone tower.

I've been told that there are no negative health effects from cell towers. I've also been told that this tower will not lower my property value. The truth is, there is no data showing the long-term effects of cell towers on growing children. [71] Don't take my word. Take the National Academy of Sciences' word.

The issue that we are debating tonight is the property-rights issue. The citizens of Roswell have the expectation and the right to live in a safe community.

Tonight we set a precedence on what we believe as a community and what direction we want to take the city. Do we want to side with our citizens for a better community or do we want to side with a corporation with short-term goals for increasing sales with no regard for who or what it affects?

I work in the aviation field, which is naturally very safety conscious. Whenever I discuss safety with a new employee, I give them the adage that drives my safety philosophies. If it doesn't look right or feel right, it probably isn't right, and it probably isn't safe.

I ask you tonight, is it right that a family should have to raise its children less than 300 feet from a cell-phone tower? Does that feel right to you? I know what my answer is. Is this the precedent we want to [72] set? Is this the Roswell we want?

Thank for your time. Thank you for your thoughtful consideration.

(Applause.)

MR. KNIGHTON: Mr. Mayor, just a couple of closing notes. Mr. Greene mentioned in his presentation—I think it was the phrase or certainly the word competition.

You know, we're in favor of competition. It's kind of amazing to me that that can be justification, when, number one, T-Mobile provides wireless service in the area; number two, their competitors, AT&T and Verizon, provide all sorts of services in the area.

Kind of sounds like you want to compete, but in the case of T-Mobile, let's say you're running the 100-yard dash, they want to start at the 50-yard line.

There's a whole lot of information that we've asked for, we got responses, but we didn't really get the info,

and potentially we're talking about pulling 5, 10, 15 million dollars in value out of our properties.

[73] I think that we deserve some direct answer to some questions. We asked them to substantiate their claim that they have local customers who demand service, and they came back and the word was, that's essentially proprietary.

We asked them to substantiate their claim that their customers are giving up their land lines. You heard it again this evening. They came back and said, well, that's proprietary.

We asked them to tell us—this is kind of a simple one—where is their MTSO, basically the central station. It's got to be somewhere because it's not onsite.

All we wanted to get a sense of was how much digging and trenching is going to take place on Lake Charles 'cause we've just gone through that, and it's not a picnic, and the word we got back was, that's proprietary.

You know, when I was a little boy, I would get into an argument with a kid, and if it started to get a little hot, my dad would say go out and give a licking or take one. But if I knew I was going to get one, [74] sometimes I'd find my mama and literally or figuratively hide behind her.

Based on some of the stuff I've heard, I think my mama would have called me proprietary. I think my daddy would have called me chicken, which kind of brings us full circle.

You know, given a choice, I'd rather have a whole mess of chickens next door than an 11-story monstrosity cell tower. There's really four things that

we talked about in our presentation, and I want to thank for your forbearance. We didn't expect it to take this long.

Talking about health risks, the stuff that hasn't been determined yet. We're talking about property values. We're talking about blight. We're talking about potential impact to the environment, all of which combine to impact, potentially impact the high quality of life that we have in Roswell and that we have in the Lake Charles neighborhood.

We like our town. We like our neighborhoods. We'd like to keep that [75] quality of life, and I encourage members of Council to deny the application as has been submitted.

Thank you very much.

(Applause.)

MAYOR WOOD: Does anyone else wish to speak?

Yes, sir. Come forward.

MR. ANDERSON: Thank you, Council members, Mayor. My name is Jeff Anderson. I live on 1021 Lake Charles Drive. I've lived on and off since 1985.

I'm also a lawyer. I'm here today to tell the Council that I believe upon my review of the TC-8 that your decision here today is simple. There's substantial evidence as been provided by the six or seven witnesses you've seen so far today that shows it's simply not in the best interest of Roswell to move forward with this cell tower at this time.

It would not be difficult to defend this decision in court. Because of this, today I'm willing to offer my services pro bono to you to defend the City should

[76] T-Mobile decide to sue the City if you do not give them the application.

(Applause.)

MR. ANDERSON: The most important thing here in your decision today is the wording of the statute of the City of Roswell, which is as follows: Your duty is to protect the health, safety, and welfare of the public and maintain the aesthetic of the community.

Allowing T-Mobile to build this tower would violate and do harm to that statute. Please vote for the will of the people. Please vote against corporate profits.

Thank you.

(Applause.)

MAYOR WOOD: Anyone else who would like to speak?

Yes, ma'am. Come forward, please.

MS. GRAFF: Mayor and City Council, I'm Jackie Graff. I live at 1085 Lake Charles Drive. I'm a little nervous. My voice is a little shaky.

I moved to Roswell over 35 years ago. There was one restaurant. Now we have many. That's progress. There was one filling [77] station, and now there are many. That's progress.

The farm across the street from me became filled with houses. That's progress. That's okay. The corner where all the horse farms were, the little store, now there's a Publix and other stores, and that's progress. But I feel like the cell tower is not progress. It puts us back.

And I think anybody considering trying to move to Roswell and this is passed and the cell tower's put

there, they would, have a second consideration because anybody's backyard could be the home of a cell tower if this is passed.

So I just say, you know, in the interest of our property values, our health, and I have several neighbors that will have to move because they have small children, and they want to—their health is very important. They will actually have to move if this cell tower goes in.

So I thank you for your attention, and let's keep Roswell like it's always been. Thanks.

[78] (Applause.)

MAYOR WOOD: Who would like to speak next?

Yes. Come forward, please.

MS. HALE: Good evening. My name is Kirsten Hale. I live at 1240 Waterford Way. And interestingly, I received a flyer on my mailbox this morning, and I had heard a little bit about the cell tower just because I drive down Lake Charles.

My home is—I don't know. I haven't been able to do any background work on this, but just looking at these pictures earlier, my backyard would probably face the cell tower, and I would be confident in saying that I could probably see it from my backyard.

My question is, the Lake Charles Road has been under—it's been closed down for construction for sewer and water area. I find that interesting that it has been closed down about—I don't know how many weeks now, but this particular project seems to be in the same area.

And I am just wondering if this room [79] would not be far more filled if that road were open and people

had an opportunity to see the posting of the signs, you know, indicating what was going on back here.

(Applause.)

MS. HALE: I am just hopeful that this is not something that is going to be swept through or pushed through. I just find it interesting, that coordination of that construction and this particular project.

And I truly feel that there would be more people in this room, there would probably be a greater number of people opposed to this if that road were open.

And I think everyone has done a great job tonight, and I didn't expect to speak, but I thank you for your time.

MAYOR WOOD: Thank you.

(Applause.)

MAYOR WOOD: Yes, sir? Come forward, please.

MR. ALPHERS: John Alphers, 530 Junction Point, Roswell.

Mr. Mayor, Council, Staff, and fellow citizens, I'm coming here today as a [80] telecommunications subject-matter expert. I spent ten years with Bell Laboratories and AT&T Wireless and Lucent Technologies. I'm very familiar with the types of equipment that each one of the carriers provide. With my consulting firm, I've consulted for every one of the major five carriers that are out there today.

T-Mobile has chosen a specific type of technology that requires them to put more towers in it, which is not something we did not talk about tonight. Other providers, such as Verizon and Sprint, have used different technologies that allows towers to be further apart from one another.

As we talked recently, technology will change greatly over the next couple years. So just because T-Mobile decided to choose this type of technology, does that mean the citizens of Lake Charles should be the bearers of having a tower in their backyard?

(Applause.)

MR. ALPHERS: Second is sale and valuation. That was mentioned twice. It's important to understand when [81] telecommunications go up for sale, they sell their assets, nontraditional sale, which is done by profits or revenue.

Assets are a thing such as towers and cable and infrastructure. The reason for this going in is for the simple fact that it makes the valuation of T-Mobile higher than it is today.

T-Mobile will sell in the next several years, and that's probably a business foregone conclusion. And while we wish them nothing but luck and they have great service in the city of Roswell or anywhere else, not at the behest of our homeowners.

Last but not least is precedence. If it goes in in Lake Charles, will there be one in Roswell Station in my neighborhood next or will there be one on the third hole at Willow Springs at the golf club or will there be one right by the clubhouse at Horseshoe Bend next?

Once we set the precedence of allowing these in residential areas, it goes downhill from there. I think the answer is clear tonight.

[82] Thank you so much for your service. I obviously oppose the tower. God bless you.

(Applause.)

MAYOR WOOD: Does anyone else wish to speak?

Yes, sir. I see a hand over here.

MR. VICK: My name is Earl Vick. I've lived here for several years, and I was reading in the paper just this past week that Roswell was one of the best cities in the whole United States.

(Applause.)

MR. VICK: And I said, yes, it is, and it's because of you people up there and the people before you that sat in those chairs. It's because you've done a wonderful job, and you still are doing that, and I just wanted to tell you that I appreciate it, and I enjoy living here in Roswell.

(Applause.)

MAYOR WOOD: Thank you for speaking.

Does anyone else wish to speak?

I see no hands up.

We'll ask the applicant to come back for rebuttal.

[83] MR. GREENE: Well, first of all, I'm going to try to address all of the concerns. I think if I didn't, the applicants that are behind us are going to join these folks in wanting to knock me down to the ground.

I'm not going to address the case law that was brought up because I'm not an attorney.

In regards to the first, the photo sims, photo sims are not perfect. I don't believe they were required as part of the application. When we did do them, you know, it may have been windy, but I have every faith that the consultant we hired to do the photo simulations had the knowledge to know when that time—if they've done hundreds of them, knew when

that balloon was worthy and need to take the photograph.

Mr. Knighton's photograph was actually of a 150-foot-tall monopine, but I believe it was to be located at the—one of the proposals at the fire station.

What you have before you tonight is a 108-foot monopine. This particular tower, like has been stated before, is to be 20 [84] feet above the existing tree canopy.

We—in regards to Staff's recommendations regarding additional planning, we're willing to come along and put like a 5-foot buffer along the three adjacent properties to the east. I think they want to surround the compound.

We're willing to put a 5-foot landscape strip along Ms. Levine's property and the other two adjoining us to the east with Leyland cypress, similar to what Mr. Scherer has going down his driveway now.

In regards to the moving the sites to commercial areas, I'd like to—this is a—I don't know how well you're going to see this, but this is the zoning map of this particular area.

Okay. The red circle represents the area we were looking—the area that was most optimal to provide the coverage we require. See down here at the bottom is the property. Up here is the fire-station property.

But what I'm trying to show is, this entire area is zoned residential. From [85] basically Woodstock Road all the way to the Cobb County line, it's residential, and basically from Crossville Road south is residential. There is no area other than residential to provide service or to locate a site.

We took your ordinance. Your ordinance states that we can apply for a tower in a residential area based on certain criteria. We have met that criteria. People have stated in regards to the stealth tower. Well, it states in the ordinance man-made trees. This is a man-made tree. We have certain setbacks we have to meet. We meet those setbacks.

We have taken your ordinance—we initially, actually, based on the fire-station property, a site which was shown as a—on the 2003 facilities map as a potential candidate, we made the proposal to go on that site, and the City decided it did not want us to move forward with that location.

We've dropped the height from that original proposal to 108 feet. We can only [86] go—we can only do what we're provided with by the City, and we have gone out and diligently searched this area.

We have found a site that meets your ordinance. Your ordinance was written to protect the safety and welfare of folks, and I would think that there was a lot of input put into this particular ordinance in regards to that.

I know some of you may not have been involved with that back in 2003 or whatever the date of the ordinance was adopted, but we can only go by what we're given.

Now, I don't know as far as what Verizon or AT&T have out in that area, but that area is all residential, and people are right; we still have a need for service. Even though the fire-station property was rejected, we still have a need for service, so we're going to come back out there and try to find a site that meets the ordinance, which we did.

The City has—as I indicated in my initial presentation in regards to the NIXLE, the City—it's a great system. [87] Cobb County has a similar system. That's not going to work if the infrastructure is not there. It's not going to work. You've got to think to yourself, most people are going to need that service at home. They're not going to need it in commercial areas. They're going to be at home. A lot of them may not even work in the city of Roswell. They're going to need them at home.

So Beau Simpson is here, and I'm going to let him come up, if it's okay with y'all, to speak about property damage. That seems to be a concern, as well. I'm going to have him come up and speak to that and answer any more questions that y'all may have.

Thank you.

MAYOR WOOD: Yes, sir.

MR. SIMPSON: Hello. My name is Beau Simpson. I live in DeKalb County, 368 Academy Court. My office is in Fulton County, and I'm an appraiser primarily. I also do a lot of consulting work. I have the MAI designation from the Appraisal Institute. I have a CRE designation from the Council of Real Estate Specialists, and [88] I've lived in Atlanta my whole life.

I've been appraising for over 20 years. I've been working on cell towers for probably about 15 years. In the last 10 years, they constitute a very small part of my business because, for one reason, the growth of the networks have not been as dramatic.

I was asked by T-Mobile to do two things, which I did. One was just to prepare a study examining cell towers in Fulton County and rendering my opinion as

to whether or not cell towers have an impact on property values.

Residential properties sell most often, so it's the easiest location to try to prove or disprove whether this happens. This tends to be the setting where it comes up, in residential areas or proposed residential areas, so we focused on that.

Fulton County has a lot of cell towers. I think we looked at over a thousand. We narrowed it down to some that we felt like were constructive. They were close to subdivisions. Some of them were in [89] subdivisions.

You know, there's a lot of differences between houses. You all know that. There's a lot of things that influence the price of a house. So the perfect example for us would be a brand-new subdivision that has a cell tower in it and some of the homes can see it and some of the homes can't see it.

Another example would be a brand-new subdivision that is half built and half sold and then the cell tower's built and then the other half is built and sold, and we have found examples like that.

And we've got empirical data and looked at it, and we've looked at the averages. We looked at the price per square foot and every other away and tried to discern whether or not these cell towers have any influence on value, and they don't.

And typically, typically—

(Laughter.)

MR. SIMPSON: Typically, residents are of the opinion that this is an obnoxious use. Cell-tower companies, in my opinion, go to a good bit of trouble to

put them in a [90] place that is not obnoxious and is not intrusive, and this is a great example of that.

I have examples that you would very easily call obnoxious that are much more intrusive than this, cell towers and other types of towers, radio towers that are over two and three hundred feet tall.

And so we get the data, and it tells us something, but we go further than that. We go interview the people who buy and sell the homes. We go to the homeowners. We ask them, how did this influence your purchase decision? Does it matter to you? And they tell us that it doesn't.

Now, I'm not saying that people don't have an opinion and it's not a valid opinion, but if you put a house up for sale and two people come along and say, I really don't like the tower, well, there's eight more people that come along that don't even notice it. They literally don't—

(Audience outburst.)

MAYOR WOOD: Listen. Have quiet in the audience, please.

[91] MR. SIMPSON: And I will tell you, personally I've looked at cell towers where I thought I was about to find out the example that proved that it hurts value. I literally personally looked at it, said, okay, here it comes. I'm going to go find out. And I knocked on the door, and to my surprise, it didn't matter.

And so I think you've been given copies and they've been submitted in the record, the studies that I've done, and this tower is 108 feet disguised as a pine tree, and it's my opinion it will have no impact on value or appreciation rates, which I have also gone to

the trouble to demonstrate. I will be glad to discuss them or even show them to you.

Thank you.

MAYOR WOOD: Thank you, sir.

MR. GREENE: I'd like to add, too—you've got this in your package regarding property-valuation studies, but this is a City of Atlanta Police tower in Chastain Park. And if you've been to Chastain Park, you've probably seen it. It's on the south [92] end of Chastain Park. Mr. Simpson did valuations prior to and after the tower was built, saw no impact whatsoever.

I also want to point out that blight's been brought up. If you've been through Chastain Park, that area, I don't think there's any blight going on in that area. This tower is a 199-foot-tall self-supporting tower. It's not a 108-foot monopine. And it was built in 2001, and there's no blight in Chastain Park area.

And we feel it necessary based on some discussions or some testimony regarding the technologies. I'm going to ask Marquise to come back up and address what she can based on some of the testimony that was given in regards to the technology.

MS. LEWIS: Hello. I'd like to address some of the things that I remember being brought up as concerns by some of the citizens here tonight.

One person mentioned that T-Mobile would be able to provide 911 services via several alternative methods, so I wanted to kind of speak on those.

[93] Using triangulation technology is not a replacement for building the new facility because we're building the facility because we don't have adequate signal, so we can't provide the signal in order to the signal that's needed to do that triangulation.

The whole point is that the adjacent towers cannot serve the area, so therefore, we cannot use that as a replacement to provide 911 services in the area.

As far as GPS technology, I think that was something else that was mentioned. We can't require every customer to change their phone. Every customer should be able to use their phone, you know, whether or not it has extra features such as GPS technology enabled on it, and customers want to talk on their phones.

And that's what we're really trying to provide here, is an opportunity for customers to talk on their phones, whether in their vehicles or in their homes, so that's really not a solution for what we're trying to do here.

Not only trying to provide 911 services [94] but we're trying to enable customers to carry a reliable call within this area, whether in their vehicles or in their homes.

As far as—I think someone mentioned that they did a drive test. I don't know the particulars and intricacies of that drive test, but there are so many variables that can come into play.

And T-Mobile does know we have a need in that area, and we cannot provide service up to T-Mobile's standards, reliable service in vehicles and in homes, in the area that we're striving for.

I don't know how long the calls were maintained. A lot of times there are different access thresholds than there are thresholds that are needed to carry a call, which on a live network, there's interference as other towers come into play.

I have no idea what the particulars are, but I can just reinforce that T-Mobile does have a need in this area.

Something else that I think was brought up, and I know we can't really factor it in in addressing or regarding this application, [95] but I would like to reiterate that T-Mobile is well within the FCC standards for MPE compliance with this facility.

And I think, finally, one gentleman said that T-Mobile is in need of this tower because we have chosen an inferior technology, so I would like to kind of reiterate that T-Mobile is on the cutting edge of technology.

He referenced technology used by, I think, Verizon and Sprint. In fact, T-Mobile is employing UMTS technology nationwide, and that is very close to the technology that is used by Verizon and Sprint, so it's not the technology.

There are so many different factors that come into play. I think a much bigger factor is the frequencies that are licensed to T-Mobile. We're limited by that, but I can't really speak on Verizon's network or Sprint's network.

I can really just reiterate that T-Mobile does have a need in the area to service its customers.

Thank you.

[96] MAYOR WOOD: Thank you.

Mr. Dippolito has a question. Please, if you would return to the microphone.

MR. DIPPOLITO: Ms. Lewis, you touched on most of the technology questions that were asked. There was a question about microcells in attics. I thought I

had read that T-Mobile does provide those, as well. Could you speak to that?

MS. LEWIS: Does T-Mobile provide microcells?

MR. DIPPOLITO: Yes.

MS. LEWIS: Absolutely, and it depends on the situation. And what we're saying here, in this situation, it's not appropriate. It's not an appropriate solution for this area.

The primary areas where you'll see microcells or distributing technologies are campus environments, a very small, concentrated area where you have a lot of users, but you have a relatively open area, and you don't have the obstructions in place that are going to prevent you from getting line of sight with your antennas, and you're [97] not covering a very, very expansive area, you know, with winding roads and obstructions here and there.

So we do deploy DAS systems and microcell technology throughout our network whenever its appropriate. It just will not work in this particular situation.

MR. DIPPOLITO: So the microcell and DAS technology are interchangeable?

MS. LEWIS: For the most part, yes.

MR. DIPPOLITO: Same technology?

MS. LEWIS: Yes, for the most part.

MR. DIPPOLITO: Thank you.

MAYOR WOOD: Council have any questions for Ms. Lewis?

Thank you, Ms. Lewis.

I see a hand up from an individual, but I will tell the general audience that they've had their opportunity to speak. This is the opportunity for the applicant for rebuttal. Once the applicant finishes rebuttal, the Council will have an opportunity for discussion. There will be a vote. There will be no further public hearing. We've had our public hearing.

[98] Yes, sir. You may proceed.

MR. GREENE: I'm just going to summarize. We have submitted an application to the City of Roswell that has gone above and beyond your requirements.

We've provided you all kinds of information, probably the most complete application I've ever done. It took a long time to get it all together, and I want to thank Brad and Jackie for working with me, but it is a very complete application.

We have proven the need. Now we are asking, respectfully request that you approve this application based on the merits of the application, based on the merits of the testimony given tonight.

Thank you.

MAYOR WOOD: Thank you, sir.

Any Council members wish to make a comment before we entertain a motion?

Council Member Wynn.

MS. WYNN: I would like to ask Mr. Greene a question, please. I think it was Ms. Knighton that brought up the generator, and one of the things I think she [99] was saying about continuous power and one of your—in your application is to have 911 service.

So how do you address the issues—if you do not have any type of backup generator onsite, how do you guarantee continuous service to T-Mobile customers?

MR. GREENE: Well, if the City Council so desires, we could put a generator out there.

(Laughter.)

MS. WYNN: That's not my question. I'm asking you, sir, what is T-Mobile's—I'm sorry. I should have clarified. What is T-Mobile's policy to ensure continuous operations of their service to their customers?

MR. GREENE: Current policy is, we do not include generators with our sites. Therefore, if the power goes out, the site would lose power. There would be no service.

(Laughter.)

MR. GREENE: There's three-hour backup. There's a battery at the site for three-hour [100] backup, which should be enough time to get the site back on the air. There's battery backup, three hours, which would give enough time to get out there, depending on the situation.

If it's a situation where there are multiple sites out, we can't promise it would be up. There is backup power at the site. It would not be a generator.

MS. WYNN: Thank you.

MAYOR WOOD: Any other questions for the applicant?

Thank you, sir.

At this time, any Council members wish to make any comments before entertaining a motion?

Council Member Orlans.

MR. ORLANS: I just wanted to say tonight, I have been on Council for quite a few years with the honor of serving the residents of Roswell, and I must say that I was quite impressed with all of the information that was put together in this package from the citizens on the issues.

And you even brought some interesting [101] information out that maybe should be forwarded to Washington, D.C., to some decision-makers up there. It's been interesting. I just wanted to compliment you on how you approached this and how you put it together.

And also, Mr. Greene, you're right. You put together probably one of the most complete packages from the other side that I've seen, as well, over the 17 years I've counciled. It's interesting to look at all of this information that you've given us, and I think we've got the information we need to make a decent decision tonight for our citizens.

Thank you.

MAYOR WOOD: Any other comments before we entertain a motion?

Council Member Igleheart.

MR. IGLEHEART: For many years before being up here, I also sat in those pews for many hours and had to come up with a lot of background information.

I think you did an amazing job. I thank you for that. I agree; a lot of work [102] on T-Mobile's side. However, one of my key concerns is that other carriers apparently have sufficient coverage in this area.

Frankly, it brings into question some of the capabilities of some of the various carriers. It's not our

mandate to level the field for inferior technology, so that concerns me.

(Applause.)

MR. IGLEHEART: It is our mandate to consider things that impact our residents. Right now we do allow towers in C-3 and I-1 zoning, which are by definition commercial and industrial. Any other zoning category, residential, are conditional.

We have to consider all the aspects. Frankly, I think we're making a mistake to open up all the various properties throughout the city for this process.

We've tried a few times to deal with that. Frankly, I think, once again, we have to work on a plan to try and deal with addressing technologies and make it to where every other neighborhood doesn't have to come in here every few months.

[103] (Applause.)

MR. IGLEHEART: Mr. Knighton, get some of the folks to help. Maybe put some of that together so we can deal with that a little better.

Bottom line here, I just don't think it's appropriate for residentially zoned properties to have the cell towers in their location. I would recommend to whomever's going to make a motion, that's something to consider.

MAYOR WOOD: Mr. Davidson, Mr. Igleheart raises a point. If we had an ordinance that said cell towers were restricted in residential zones, how do you think the courts would respond?

MR. DAVIDSON: They would say—probably be able to show in Roswell that that would prevent service in certain areas of the city because we are very

residential in nature, so I don't think we could prohibit in all residential zones.

MAYOR WOOD: So there would be a strong possibility if we did choose to pass such an ordinance that our ordinance would be [104] stricken down. Once our ordinance was struck down, what would happen?

MR. DAVIDSON: Hopefully we could have a moratorium so we can adopt another ordinance.

(Audience outburst.)

MAYOR WOOD: Cell tower without our permission, so you would not recommend taking that action suggested by Mr. Igleheart?

MR. DAVIDSON: Not at this time.

MAYOR WOOD: Thank you, sir.

Any other comments before we entertain a motion?

Council Member Dippolito.

MR. DIPPOLITO: I just want to quickly reiterate what my colleagues have said about presentations tonight. T-Mobile did an outstanding job with the information they have submitted, but the residents have gone above and beyond anything I have seen since I have been on Council.

Not only was the information precise, there was quite a bit of very interesting information that seemed to be quite factual, [105] and you're to be commended for both your presentation and effort altogether.

I think it's pretty hard to look at a cell tower like this and to not consider that would have an adverse impact on a residential area. Anytime you look at something that is this significant a change from what is in that area, I think it's hard to say that, so I do not

believe this is compatible with the natural setting, and I do not believe that I will support it.

(Applause.)

MAYOR WOOD: Does anyone else wish to comment before we entertain a motion?

MS. WYNN: Yes, sir.

MAYOR WOOD: Council Member Wynn.

MS. WYNN: Thank you, Mr. Mayor. I'm not going to do a long speech, but I agree with my colleagues. I've been up here going on three years now, but I have been a community advocate for 15 years, and I have never seen a presentation as well done as on both sides, but I do agree with my colleagues, especially Mr. Dippolito, that I don't think this is compatible with [106] this area, and I will be opposing it.

(Applause.)

MAYOR WOOD: Well, I think I've heard from everyone except Council Member Price. She is the liaison to this department, so it is therefore her responsibility to make a motion.

Ms. Price, do you have a motion to make?

DR. PRICE: Well, yes. As liaison to the department, it is my, I won't say, distinct honor but my responsibility to make some sort of motion or I could not make a motion. Nobody else would, either. But I do want to thank the applicant and all the residents who have come out this evening.

I appreciate the completeness of the application. We didn't get the response that Mr. Townsend asked for, whether or not they were willing to compromise the other location, but that's probably neither here nor there.

I think based on our ordinance, Article 21.2.1, which was shown on the screen earlier, the purpose and intent of our [107] cell-phone ordinance is to protect the residential areas from the adverse impact of telecommunication towers and to minimize the number of towers and the other adverse impacts being minimized.

I think the conclusion from that first section would be that this is aesthetically incompatible and certainly in this area. It's other than I-1, C-3 offices or highway commercial area.

Number two, the alternative tower that was proposed, in my opinion, it would not be compatible with the natural setting and surrounding structures also due to the height being created by the other trees.

And, number three, in our Ordinance 21.2.4, the proximity to residential structures, the nearness to other homes, and being within the residential zoning area and adjacent properties, therefore, the adverse effects to the enjoyment of those neighbors and potential loss of resale value among other potential parameters are difficult really to definitively assess.

Therefore, overall, I move to deny the [108] application for the wireless facility monopine tower on Lake Charles Drive.

(Applause.)

MAYOR WOOD: Motion by Council Member Price. Who would second?

MS. WYNN: Second.

MAYOR WOOD: Second by Council Member Wynn.

All in favor of the motion raise your hand. Passes unanimously.

We're going to take a 10-minute recess.

(Applause.)

(Proceedings concluded at 9:35 p.m.)

[109] CERTIFICATE

E OF GEORGIA:

TY OF CHEROKEE:

I hereby certify that the foregoing proceedings were taken down, as stated in the caption, and reduced to typewriting under my direction, and that the foregoing pages 1 through 108 represent a true, complete, and correct transcript of said proceedings.

This, the 19th day of April 2010.

MARIA K. McCUNE, CCR B-812

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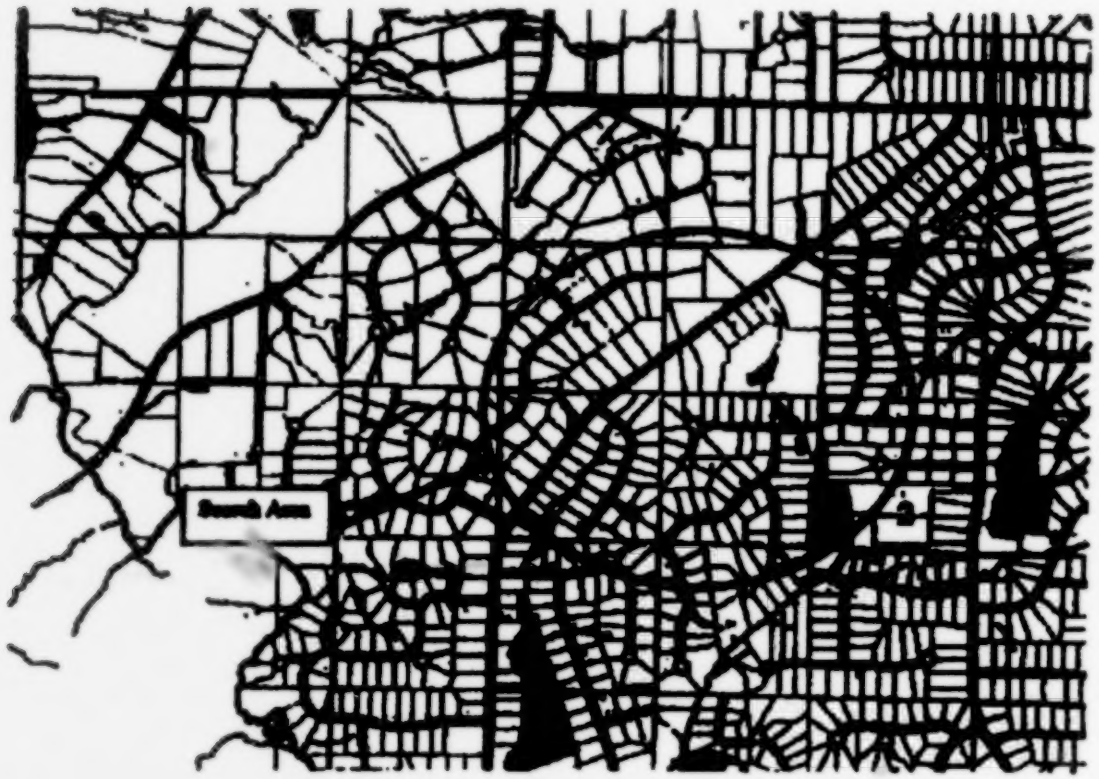
EXHIBIT A

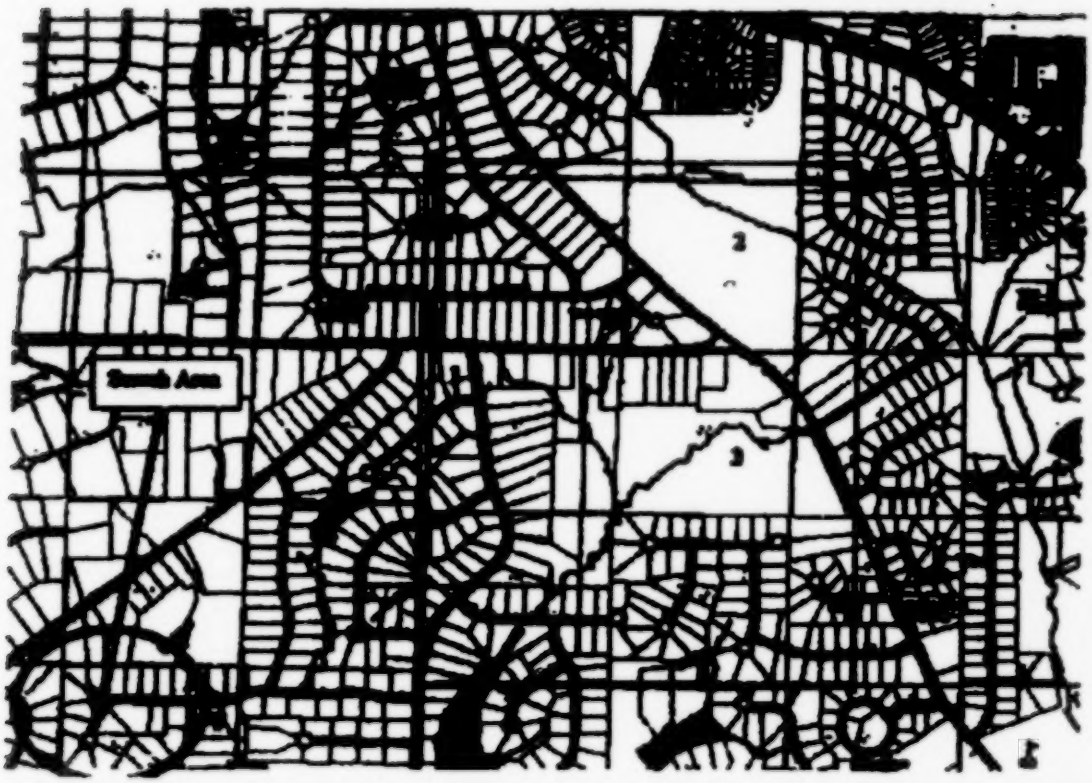
TAX MAP ANALYSIS



Search area is developed with single family homes and are zoned as such. Larger tracts within the search area are developed with single family homes and do not meet the intent of the City of Roswell code.

1. City of Roswell Fire Dept.—Although property established as a preferred facility location the proposal was rejected by City of Roswell.
2. Proposed location—undeveloped parcel.

TAX MAP ANALYSIS (continued)



1. City of Roswell Fire Dept.—Although property established as a preferred facility location per the **City of Roswell Master Siting Plan**, the proposal was rejected by City of Roswell.
2. Property too far east to provide seamless, ubiquitous, and reliable coverage. Location is also too close to existing T-Mobile facilities.
3. Properties too far east provide seamless, ubiquitous, and reliable coverage. Location is also too close to existing T-Mobile facilities.

ANALYSIS OF ADDITIONAL PARCELS WITHIN SEARCH AREA

These larger parcels within the search area are developed with single family homes and accessory structures. These parcels are not investigated because these sites are developed with single family homes and would have required significant clearing. The subject site requires minimal clearing and is an undeveloped parcel.

[LOGO]
Roswell Georgia, Since 1854

April 14, 2010

T-Mobile South, LLC
Four Concourse Parkway
Suite 300
Sandy Springs, GA 30328

Mr. Lannie Greene
SAI Communications
2421 St. Martin Way
Monroe, GA 30656

Subject: Request for a 108' Mono-pine alternative tower structure
Adjacent to 1060 Lake Charles Drive, Land Lot 261
T-Mobile South, LLC

Dear Mr. Greene:

Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at 770-641-3727.

If you have any additional questions, please contact me at 770-594-6176.

Sincerely,

/s/ Bradford D. Townsend
Bradford D. Townsend
Planning and Zoning Director

cc: reading file
wireless file

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:10-CV-1464-RWS

T-MOBILE SOUTH, LLC,

Plaintiff,

v.

CITY OF ROSWELL, GEORGIA,

Defendant.

ANSWER AND DEFENSES OF DEFENDANT THE CITY OF ROSWELL, GEORGIA

COMES NOW the City of Roswell, Georgia, named Defendant herein, and sets forth its Answer and Defenses to the Verified Complaint of T-Mobile South, LLC, as follows:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendant is not liable to Plaintiff because it breached no duty owed to Plaintiff.

THIRD DEFENSE

At all times relevant hereto, all actions or inactions with respect to the Plaintiff were carried out in the good faith performance of official duties by elected

or appointed officers and employees of the City of Roswell, and pursuant to a good faith and reasonable belief that such actions or inactions were lawful and constitutional. Accordingly, Defendant is immune from the purported claims and causes of actions set forth in Plaintiff's Complaint.

FOURTH DEFENSE

All of the actions of the Defendant toward the Plaintiff were in good faith, and without malicious and discriminatory intent.

FIFTH DEFENSE

The Petition should be dismissed to the extent that the Plaintiff has failed to properly file and outline constitutional objections prior to the time of the zoning decision.

SIXTH DEFENSE

Dismissal or deferral of Plaintiff's claims is proper under the Doctrine of Abstention.

SEVENTH DEFENSE

Defendant has not violated any provisions of 47 U.S.C. §332(c) because the Telecommunications Act defers to state and local governments concerning placement, construction and modification of personal wireless service facilities and because all Defendant's actions were consistent with the provisions of that statute.

EIGHTH DEFENSE

Any injury or damages allegedly sustained by Plaintiff were not the direct or proximate result of any action or inaction of the Defendant.

NINTH DEFENSE

In further response, and without waiving other defenses to Plaintiff's Complaint, Defendant responds to the enumerated paragraphs of Plaintiff's Complaint, by number, as follows

INTRODUCTION

1.

Defendant denies the allegations of Paragraph 1 of Plaintiff's Complaint.

JURISDICTION AND VENUE

2.

Defendant admits the allegations of Paragraph 2 of Plaintiff's Complaint.

PARTIES

3.

Based upon information and belief, Defendant admits the allegations of Paragraph 3 of Plaintiff's Complaint.

4.

Defendant admits the allegations of Paragraph 4 of Plaintiff's Complaint.

FACTS

5.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 5 of Plaintiff's Complaint.

6.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 6 of Plaintiff's Complaint.

7.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 7 of Plaintiff's Complaint.

8.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 8 of Plaintiff's Complaint.

9.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 9 of Plaintiff's Complaint.

10.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 10 of Plaintiff's Complaint.

11.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 11 of Plaintiff's Complaint.

12.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 12 of Plaintiff's Complaint.

13.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 13 of Plaintiff's Complaint.

14.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 14 of Plaintiff's Complaint.

15.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 15 of Plaintiff's Complaint.

16.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 16 of Plaintiff's Complaint.

17.

Defendant is without specific knowledge and information to either admit or deny the allegations concerning Plaintiff's investigation and further states that the Master Wireless Facilities Siting Plan speaks for itself and is intended to be a guide, not provision of any specific rights. Defendant therefore denies all remaining allegations of Paragraph 17 of Plaintiff's Complaint.

18.

Defendant admits the allegations of Paragraph 18 of Plaintiff's Complaint.

19.

Defendant admits that neighborhood input was solicited, but denies that the Master Wireless Facilities Siting Plan gives specific rights and therefore denies all remaining allegations of Paragraph 19 of Plaintiff's Complaint.

20.

Defendant admits the allegations of Paragraph 20 of Plaintiff's Complaint.

21.

Defendant admits that it did not enter into a lease for the Fire Station Site, but denies all remaining allegations of Paragraph 21 of Plaintiff's Complaint.

22.

Defendant admits the allegations of Paragraph 22 of Plaintiff's Complaint.

23.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 23 of Plaintiff's Complaint.

24.

Based upon information and belief, Defendant admits the allegations of Paragraph 24 of Plaintiff's Complaint.

25.

Defendant admits the allegations of Paragraph 25 of Plaintiff's Complaint.

26.

Defendant admits that the property is designated as E-2, but states that Wireless Communications Facilities Ordinance speaks for itself.

27.

Defendant admits the allegations of Paragraph 27 of Plaintiff's Complaint.

28.

Defendant states that its ordinances speak for themselves and denies all remaining allegations and attempts to define same in Paragraph 28 of Plaintiff's Complaint.

29.

Defendant admits the allegations of Paragraph 29 of Plaintiff's Complaint.

30.

Defendant admits the allegations of Paragraph 30 of Plaintiff's Complaint.

31.

Defendant admits the allegations of Paragraph 31 of Plaintiff's Complaint.

32.

Defendant admits the allegations of Paragraph 32 of Plaintiff's Complaint.

33.

Defendant admits the allegations of Paragraph 33 of Plaintiff's Complaint.

34.

Defendant admits that Plaintiff submitted a proposed plan to shield ancillary facilities, but denies any and all further allegations of Paragraph 34 of Plaintiff's Complaint.

35.

Pursuant to information and belief, Defendant admits the allegations of Paragraph 35 of Plaintiff's Complaint.

36.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 36 of Plaintiff's Complaint.

37.

Defendant is without specific knowledge and information to either admit or deny the allegations of Paragraph 37 of Plaintiff's Complaint.

38.

Defendant denies the allegations of Paragraph 38 of Plaintiff's Complaint.

39.

Defendant admits the allegations of Paragraph 39 of Plaintiff's Complaint.

40.

Defendant admits the first three sentences and last two sentences of Paragraph 40 of Plaintiff's Complaint, but is without specific knowledge or information to either admit or deny any of the remaining allegations as the allegations contain undefined terminology such as "completed growth and

development" and "mature tree coverage and vegetation."

41.

Defendant states that the ordinance speaks for itself and denies all other allegations and attempts to define the ordinance as set forth in Paragraph 41 of Plaintiff's Complaint.

42.

Defendant admits the allegations of Paragraph 42 of Plaintiff's Complaint.

43.

Defendant admits the allegations of Paragraph 43 of Plaintiff's Complaint.

44.

Defendant admits the allegations of Paragraph 44 of Plaintiff's Complaint.

45.

Defendant states that the Planning Staff's Analysis speaks for itself and denies all other allegations and attempts to define or interpret the allegations of Paragraph 45 of Plaintiff's Complaint.

46.

Defendant states that the Planning Staff's Analysis speaks for itself and denies all other allegations and attempts to define or interpret the allegations of Paragraph 46 of Plaintiff's Complaint.

47.

Defendant states that the Planning Staff's Analysis speaks for itself and is without knowledge or

information to either admit or deny the remaining allegations of Paragraph 47 of Plaintiff's Complaint.

48.

Defendant admits the allegations of Paragraph 48 of Plaintiff's Complaint.

49.

Defendant admits the allegations of Paragraph 49 of Plaintiff's Complaint.

50.

Defendant denies the allegations of Paragraph 50 of Plaintiff's Complaint.

51.

Defendant denies the allegations of Paragraph 51 of Plaintiff's Complaint.

52.

Defendant denies the allegations of Paragraph 52 of Plaintiff's Complaint.

53.

Defendant admits the allegations of Paragraph 53 of Plaintiff's Complaint.

54.

Defendant denies the allegations of Paragraph 54 of Plaintiff's Complaint.

55.

Defendant denies the allegations of Paragraph 55 of Plaintiff's Complaint.

56.

Defendant admits that the letter and testimony was presented, but denies all remaining allegations concerning the evidence as set forth in Paragraph 56 of Plaintiff's Complaint.

57.

Defendant admits the allegations of Paragraph 57 of Plaintiff's Complaint.

58.

Defendant admits that Plaintiff's representative made a presentation regarding availability of other sites, but denies all remaining allegations concerning the evidence as set forth in Paragraph 58 of Plaintiff's Complaint.

59.

Defendant admits the allegations of Paragraph 59 of Plaintiff's Complaint.

60.

Defendant admits the allegations of Paragraph 60 of Plaintiff's Complaint.

61.

Defendant admits the allegations of Paragraph 61 of Plaintiff's Complaint.

62.

Defendant admits that Plaintiff's representative spoke about diminution in property values, but denies all remaining allegations concerning the evidence as set forth in Paragraph 62 of Plaintiff's Complaint.

63.

Defendant denies the allegations of Paragraph 63 of Plaintiff's Complaint.

64.

Defendant admits the allegations of Paragraph 64 of Plaintiff's Complaint.

65.

Defendant denies the allegations of Paragraph 65 of Plaintiff's Complaint.

66.

Defendant denies the allegations of Paragraph 66 of Plaintiff's Complaint.

67.

Defendant denies the allegations of Paragraph 67 of Plaintiff's Complaint.

68.

Defendant denies the allegations of Paragraph 68 of Plaintiff's Complaint.

69.

Defendant admits that citizens spoke against the proposed facility, but states that the minutes of the meetings speak for themselves and deny all allegations and attempts to define or interpret same as set forth in Paragraph 69 of Plaintiff's Complaint.

70.

Defendant states that the minutes of the meetings speak for themselves, as well as the ordinances, and deny all allegations and attempts to define or interpret same as set forth in Paragraph 70 of Plaintiff's Complaint.

71.

Defendant denies the allegations of Paragraph 71 of Plaintiff's Complaint.

72.

Defendant denies the allegations of Paragraph 72 of Plaintiff's Complaint.

73.

Defendant denies the allegations of Paragraph 73 of Plaintiff's Complaint.

74.

Defendant admits that the Application was denied, but deny all remaining allegations of Paragraph 74 of Plaintiff's Complaint.

75.

Defendant admits that a letter was issued, but denies all remaining allegations of Paragraph 75 of Plaintiff's Complaint.

76.

Defendant denies the allegations of Paragraph 76 of Plaintiff's Complaint.

77.

Defendant is without specific information to admit or deny the allegations of Paragraph 77 of Plaintiff's Complaint.

78.

Defendant denies the allegations of Paragraph 78 of Plaintiff's Complaint.

79.

Defendant states that the minutes of the meeting speak for themselves and deny all remaining allegation and attempts to define or interpret same as set forth in Paragraph 79 of Plaintiff's Complaint.

80.

Defendant denies the allegations of Paragraph 80 of Plaintiff's Complaint.

81.

Defendant denies the allegations of Paragraph 81 of Plaintiff's Complaint.

82.

Defendant denies the allegations of Paragraph 82 of Plaintiff's Complaint.

83.

Defendant denies the allegations of Paragraph 83 of Plaintiff's Complaint.

84.

Defendant admits that the Application has been denied and Plaintiff cannot build its structure as requested, but denies all remaining allegations of Paragraph 84 of Plaintiff's Complaint.

85.

Defendant denies the allegations of Paragraph 85 of Plaintiff's Complaint.

86.

Defendant denies the allegations of Paragraph 86 of Plaintiff's Complaint.

87.

Defendant denies the allegations of Paragraph 87 of Plaintiff's Complaint.

COUNT I - VIOLATION OF THE TELECOMMUNICATIONS ACT

(DECISION NOT SUPPORTED BY SUBSTANTIAL EVIDENCE)

88.

Defendant incorporates its defenses and all responses to Paragraphs 1 through 87 as set forth fully herein.

89.

Defendant states that the laws speak for themselves and contain many more provisions than those selected by Plaintiff.

90.

Defendant states that the laws speak for themselves and contain many more provisions than those selected by Plaintiff.

91.

Defendant admits the allegations of Paragraph 91 of Plaintiff's Complaint.

92.

Defendant denies the allegations of Paragraph 92 of Plaintiff's Complaint.

93.

Defendant denies the allegations of Paragraph 93 of Plaintiff's Complaint.

94.

Defendant denies the allegations of Paragraph 94 of Plaintiff's Complaint.

95.

Defendant denies the allegations of Paragraph 95 of Plaintiff's Complaint.

96.

Defendant denies the allegations of Paragraph 96 of Plaintiff's Complaint.

COUNT II - VIOLATION OF THE TELECOMMUNICATIONS ACT

(PROHIBITION OF WIRELESS SERVICES)

97.

Defendant incorporates its defenses and all responses to Paragraphs 1 through 96 as set forth fully herein.

98.

Defendant denies the allegations of Paragraph 98 of Plaintiff's Complaint.

99.

Defendant denies the allegations of Paragraph 99 of Plaintiff's Complaint.

100.

Defendant denies the allegations of Paragraph 100 of Plaintiff's Complaint.

101.

Defendant denies the allegations of Paragraph 101 of Plaintiff's Complaint.

COUNT III - VIOLATION OF THE TELECOMMUNICATIONS ACT (UNREASONABLE DISCRIMINATION AMONG PROVIDERS OF FUNCTIONALLY EQUIVALENT SERVICES)

102.

Defendant incorporates its defenses and all responses to Paragraphs 1 through 101 as set forth fully herein.

103.

Defendant denies the allegations of Paragraph 103 of Plaintiff's Complaint.

104.

Defendant denies the allegations of Paragraph 104 of Plaintiff's Complaint.

105.

Defendant denies the allegations of Paragraph 105 of Plaintiff's Complaint.

106.

Defendant denies the allegations of Paragraph 106 of Plaintiff's Complaint.

107.

Defendant denies the allegations of Paragraph 107 of Plaintiff's Complaint.

GENERAL DENIAL

All remaining allegations and inferences in Plaintiff's Complaint are denied. In addition, Plaintiff is not entitled to any of the relief requested in his prayers.

WHEREFORE, having fully answered, the Defendant prays that Plaintiff's Complaint be dismissed with all costs cast upon the Plaintiff.

This 7th day of June, 2010.

CAROTHERS & MITCHELL, LLC

/s/ Richard A. Carothers

Richard A. Carothers
Georgia Bar No. 111075
Regina Benton Reid
Georgia Bar No. 006630

Attorneys for Defendant
City of Roswell

1809 Buford Highway
Buford, Georgia 30518
(770) 932-3552

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:10-CV-1464-RWS

T-MOBILE SOUTH, LLC

Plaintiff,

v.

CITY OF ROSWELL, GEORGIA,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date electronically filed the foregoing ANSWER AND DEFENSES OF DEFENDANT CITY OF ROSWELL, GEORGIA with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Scott E. Taylor, Esq.
J. Tucker Barr, Esq.
Arnall, Golden, Gregory, LLP
171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363

I further certify pursuant to L.R. 7.1D that the above-titled document complies with L.R. 5.1B and was prepared using a 14 point Times New Roman font.

This 7th day of June, 2010.

CAROTHERS & MITCHELL, LLC

/s/ Richard A. Carothers
Richard A. Carothers
Georgia Bar No. 111075
Attorneys for Defendant
City of Roswell

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(770) 932-3552

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Roswell Neighborhoods
Against Cell Towers

Exhibit 6

Current Alternatives to Proposed Tower

WIKIPEDIA

"Cellular repeater"

From Wikipedia, the free encyclopedia

(Redirected from Wireless cellular repeater)

This page was last modified on
25 February 2010 at 10:30.

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The examples and perspective in this article may not represent a worldwide view of the subject. Please improve this article and discuss the issue on the talk page.

A cellular repeater, cell phone repeater, or wireless cellular signal booster, a type of bi-directional amplifier (BDA) as commonly named in the wireless telecommunications industry, is a device used for boosting the cell phone reception to the local area by the usage of a reception antenna, a signal amplifier and an internal rebroadcast antenna. These are similar to the cellular broadcast towers used for broadcasting by the network providers, but are much smaller, usually intended for use in one building. Modem cellular repeater amplifiers rebroadcast cellular signals inside the building. The systems usually use an external, directional antenna to collect the best cellular signal, which is then transmitted to an amplifier unit which amplifies the signal, and re-transmits it locally, providing significantly improved signal strength. The more advanced models often also allow multiple cell phones to use the same repeater at the same time, so are suitable for commercial as well as home use.

* * *

expected to grow rapidly over the coming years, particularly in the USA. This is due to the combination of the poor network coverage in some areas, and the large scale departure from the land-line system. The CTIA (Cellular Telecommunications & Internet Association) had predicted that by 2007 30% of phone users in the US would be mobile only—more than 60 million lines. This combined with the low population density (compared with Europe and Japan); the fact that only 41% of the US population is urban [citation needed]; the low cell site density; and the fact that the cell network is split into over ten major providers [citation needed] means that many people will have to use some method to improve their home signal.

Other advantages of cellular repeaters include an increase in the cell phone's battery life and a lower level of radiation emitted by the handset—both caused by the lower power required to broadcast the signal to the local bi-directional amplifier, due to its proximity to the phone.

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  - 2.3 Building size
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- 3. Different operating frequencies
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Typical components [edit]

External directional antenna [edit]

Although some of the less expensive models do not include an external directional antenna they are crucial to providing significant signal strength gain. This is because the antenna can be oriented and located outside to provide the best possible signal, usually aligned with the nearest cell tower. Generally speaking the larger the external antenna the better the signal—although even a small, correctly oriented external antenna should provide better signal than the internal antenna on any cell phone. These can either be fitted by professionals or will include a signal strength monitor for easy alignment.

Internal rebroadcast antenna [edit]

The better systems will generally include an internal monopole antenna (although the type of antenna is far from standardised) for rebroadcasting the signal internally—the advantage of using a monopole antenna is that the signal will be equally distributed in all directions (subject, of course, to attenuation from obstacles). Because all radio antennas are intrinsically polarized, cell phones perform best when their antennas are oriented parallel to the booster's antenna—although within reasonable proximity the booster's signal will be strong enough that the orientation of the cell phone's antenna will not make a significant difference in usability.

Signal amplifier [edit]

All models will include a signal amplifier. Even the cheaper home-use models (typically band selective) now provide 20dB—50dB gain and many of the more expensive models provide over 50dB. Excellent high-

power models (not home usage—smart and expensive technology of the operators) offering gain around 100dBm (ICE function is welcomed as a improvement of the radio isolation between donor and service antenna). However, it should be noted that since the decibel scale is measured on a logarithmic scale a 30dB gain represents a one thousandfold signal power increase—meaning the total amplification of a repeater with greater than around 50dB is likely to be useless without a good, well aligned antenna. This is due to the difficulty of filtering the correct signal out from the background noise, which will be amplified equally, and the limiting maximum signal power of the amplifier (for picorepeaters typically from around 5 dB m (3.2 mW)). Standard GSM channel selective repeater (operated by telecommunication operators for coverage of large areas and big buildings) has output power around 2W, high power repeaters (e.g. NodeG from Andrew) offering output power around 10W). The power gain is calculated by the following equation:

$$P_{dB} = 10\log_{10}(\frac{P}{P_0})$$

For repeater is needed to secure sufficient isolation between donor and service antenna. When the isolation is lower than actual gain + reserve (typically 5-15dB) then repeaters is in loop oscillation. Also cheap models are equipped by automatic gain reduction in case of poor or weak isolation. In case of poor isolation the device works but with low gain.. and coverage is poor. The isolation is possible to improve by antenna type selection, in macro environment by angle between donnor and service antenna (ideally 180°), space separation (typically vertical distance in case of the tower installation between donnor and service antenna is several meters),

inserting of the attenuating environment (smart placement of the donor and service antenna e.g. between donnor and service antenna is wall.. placement of the metal mesh), reduction of reflections—in front of the donor antenna no near obstacle (like tree, metal-sheet building, glasshouse, house ..)) Isolation can be also improved by integrated feature called ICE (interference cancellation equipment) offered in some products (e. g. NodeG, RFWindow,..). Activating of this feature has negative impact to internal delay (higher delay=> prox. +5us up to standard rep. delay) and consequently to shorter radius from donor site, where could be repeater used.

By amplification and filtration there is some delay (typically between 5us to 15us). It depends on the type of repeater and used features. Additional delay form point of view of propagation means additional distance. Because of the cellular network has form principle reduced cell size (depends on the technology and activated features typically X*10 km (for standard GSM 20 km..).. usage of repeater virtually moving user to bigger distance: radio distance = real distance + (repeater delay)*3.3 km (delay of RF signal in air is 3.3us/km). It is reason why somewhere with sufficient levels repeater doesn't work. After repeating you have better (or excellent) coverage but you can't access to network! User is from network point of view too far..

There is also problem with noise amplification (especially in UL) and desensitization of the donor site.

Amateur installation of the pico/mini repeaters can be harmful for many reasons:

- Poor choice of donor site may not improve signal
- Using the wrong antenna and improperly installing the repeater without paying attention

to minimizing interference (e.g. installing the repeater in a higher place than necessary, being shaded by buildings (e.g. by wall installation or suppression of side/back lobes by chimney, etc.)) and without sense to donor site selection.

- Use of a poor device for signal generation, causing noise and inter-modulation products.
- Repeating only part of the band, such as in cases where the operator is using wider band (e.g. EGSM) or more bands and the repeater does not support EGSM or is only for 900GSM. Operators can operate also EGSM or GSM900+ GSM1800 layers with single BCCH (Siemens (SAG) commonly supports the BCCH feature. In the case of improper repeater support, many calls may drop).

Reasons for weak signal [edit]

Rural areas

In many rural areas the housing density is too low to make construction of a new base station commercially viable. In these cases it is unlikely that the service provider will do anything to improve reception, due to the high cost of erecting a new tower. As a result, the only way to obtain strong cell phone signal in these areas is usually to install a home cellular repeater. In flat rural areas the signal is unlikely to suffer from multipath interference, so will just be heavily attenuated by the distance. In these cases the installation of a cellular repeater will generally massively increase signal strength just due to the amplifier, even a great distance from the broadcast towers.

Building construction material [edit]

Some construction materials very rapidly attenuate cell phone signal strength. Older buildings, such as churches, which use lead in their roofing material will very effectively block any signal. Any building which has a significant thickness of concrete or amount of metal used in its production will attenuate the signal. Concrete floors are often poured onto a metal pan which completely blocks most radio signals. Some solid foam insulation and some fiberglass insulation used in roofs or exterior walls has foil backing, which can reduce transmittance. Energy efficient windows and metal window screens are also very effective at blocking radio signals. Some materials have peaks in their absorption spectra which massively decrease signal strength.

Building size [edit]

Large buildings, such as warehouses, hospitals and factories, often have no cellular reception further than a few meters from the outside wall. Low signal strength is also often the case in underground areas such as basements and in shops and restaurants located towards the centre of shopping malls. This is caused by both the fact that the signal is attenuated heavily as it enters the building and the interference as the signal is reflected by the objects inside the building. For this reason in these cases an external antenna is usually desirable.

Multipath interference [edit]

Even in urban areas which usually have strong cellular signals throughout, there are often dead zones caused by destructive interference of waves which have taken different paths (caused by the signal bouncing off buildings etc.). These usually have an

area of a few blocks and will usually only affect one of the two frequency ranges used by cell phones. This is because the different wavelengths of the different frequencies interfere destructively at different points. Directional antennas are very helpful at overcoming this since they can be placed at points of constructive interference and aligned so as not to receive the destructive signal. See Multipath interference for more.

Diffraction and general attenuation [edit]

The longer wavelengths have the advantage of being able to diffract to a greater degree so are less reliant on line of sight to obtain a good signal, but still attenuate significantly. Because the frequencies which cell phones use are too high to reflect off the ionosphere as shortwave radio waves do, cell phone waves cannot travel via the ionosphere. See Diffraction and Attenuation for more.

Different operating frequencies [edit]

Repeaters are available for all the different GSM frequency bands, some repeaters will handle different types of network such as multi-mode GSM and UMTS repeaters however dual- and tri-band systems cost significantly more. Repeater systems are available for certain Satellite phone systems, allowing the satphones to be used indoors without a clear line of sight to the satellite.

Approval in the USA by the FCC [edit]

Although there are some products on the market in the USA which are still pending FCC approval, they should have no problem gaining it. Although a license was originally required to broadcast at cell phone frequencies, it is legal to use the low power devices available today for home and small scale use in

commercial areas (offices, shops, bars etc.). Many models already have FCC approval.

See also [edit]

- Base Station Subsystem
- Cellular network
- Cell phone
- Coverage noticer
- Dead zone (cell phone)
- Coiler
- Waves

Categories: Radio electronics | Mobile technology | Telecommunications infrastructure

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BARRON'S

Tech Trader Daily

News, analysis and insights from
Barron's Silicon Valley Bureau

March 24, 2010, 2:55 P.M.

[ONLINE]

CTIA: AT&T Wants To Connect Everything To The Internet

By Eric Savitz

AT&T (T) wants to connect more or less everything you can think of to the Internet. The company, which has been boasting about its dominant position in the U.S. smart phone market, is one of a number of participants in this week's CTIA Wireless show in Las Vegas that expects the Internet of things to rapidly blow past the wireless Internet now dominated by mobile phones.

The strategy became clear this afternoon at a meeting this afternoon with media and analysts.

At the event, Ralph de la Vega, chief of AT&T Mobility and Consumer Markets took a victory lap in the smart phone race. Repeating a theme he touched on in a keynote address yesterday, de la Vega this afternoon noted that AT&T has 30 million 3G data subscribers in the U.S., more than any other carriers, with more than twice the number of smart phones in service than any other U.S. carrier, and customers downloading more apps than any other carriers.

Cisco CTO Padmasree Warrior earlier today predicted that there will be 1 trillion connected devices on the Internet by 2013. That view fits right in with AT&T's view of the world.

At the lunch, David Christopher, chief marketing offer for the mobility and consumer markets group, ran through some comments on the company's smart phone business, noting for instance that the company is the only carrier with offerings running on the iPhone OS, Android, Symbian, BlackBerry, Palm WebOs and Windows Mobile. (Due in part to the exclusive on the Apple (AAPL) iPhone.)

Some other key points from Christopher:

- Smart phones are 35% of AT&T handset units.
- Christopher said the company is focusing on selling more "quick messaging" phones, which accounted for 30% of units in the fourth quarter. To bring apps to those phones, the company has adopted the BREW platform from Qualcomm (QCOM), and is encouraging developers to write apps for the phones.
- This week they launched four new phones in this category, the Samsung Strive and Sunburst, and the Pantech Link and Pursuit.
- Christopher says they are "rethinking messaging," to allow embedded videos, threaded messaging, and other features to make messaging more useful.
- Another new software offering is the AT&T Address Book, for managing and backing up contacts over the Web. The service is free; starts this week on the Samsung Strive, and will be spread from there.

- Another new service launch is AT&T Locker, to upload pictures to the Web. Upoloads are 35 cents a month.
- Another new service, launched today in this case, is AT&T Music, for discovering, playing and shopping for music in one place on your phone. The service is $6.99 a month.
- Today, the company announced the 3G Microcell, a femtocell you plug into your broadband line. You get 5-bar calling, at $19.99 a month, and there is a $149 one-time fee for the cell. Launches in April on a phased roll out approach. *UPDATE: A clarification from AT&T: "The $19.99/month for MicroCell is an optional calling plan that provides unlimited calls over the MicroCell for $19.99 per month. It is not required though. MicroCell customers who don't subscribe to the $19.99 unlimited plan are charged for calls over the MicroCell just the same as they are charged for all other cell calls, as per the plan they subscribe to."*
- Finally, he is demonstrating U-verse Mobile, a service which AT&T CEO Randall Stephenson mentioned yesterday in his keynote. The service allows you to control your DVR remotely—and watch content on your phone.

In what was clearly the more forward aspect of the presentation, Glenn Lurie, president of emerging devices, laid out with great enthusiasm the opportunities the company sees in non-phone devices.

- They think this is the next big thing in the mobility space. The idea, he says, is to "wirelessly enable everything."

- Lurie says this is a huge opportunity. Every device, he contends, would be better if connected. The opportunity, he says, is here now.
- Over the last year they have launched service on many devices. Netbooks galore. Amazon Kindle. The Sony Reader. TomTom and Garmin connected GPS devices. Barnes & Noble Nook. Digital picture frames. And the Apple iPad.
- Other opportunities in health care, smart meters, gaming devices, tablets, digital cameras, media players. in-car telematics. He says the opportunity here is endless.
- They are launching this week third-party applications for tracking people, creatures and things, or as he puts it, tracking "people, pets and pallets." Also using the network: a network-enabled gaming device called Zeebo, which started with a launch in developing markets.
- Another application: intelligent pill caps, to make sure you take your medication.

T today is down 27 cents, or 1%, to $26.28.

* * *

Add a Comment

* * *

There are 2 comments

4:11 pm March 24, 2010

Nancy wrote:

If AT&T has 30 million 3G data subscribers, how many does Verizon have? And if AT&T has twice as many Smart Phones in service, how many do they and Verizon have? Anyone have those numbers per device?

Thank you. And cheers.
Nancy.

5:22 pm March 24, 2010

B2B Insights Barron's wrote:

B2B IT and Marketers: Does this type information change influence your content management/ delivery strategy?

About Tech Trader Daily

Tech Trader Daily is a blog on technology investing written from Palo Alto, California by long-time Barron's West Coast Editor Eric J. Savitz. The blog provides news, analysis and original reporting on events important to investors in software, hardware, the Internet, telecommunications and related fields. Comments and tips can be sent to: techtraderdaily@barrons.com.

* * *

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"There are a lot of poor people in China, BUT THERE ARE ALSO A LOT OF RICH PEOPLE IN CHINA..."

On Apple: Can iPhone Conquer China?

"Expect a BOGO offer from ATT within a few months after the Pre / Pixi launch as they try to unload their..."

On Palm To Launch Pre Plus, Pixi Plus For AT&T; $149.99, $49.99

"If Steve jobs dies, all bets are off. Sorry to put it so bluntly but it's the truth. Apple without..."

On Apple: Now #3

* * *

AP ASSOCIATED PRESS

No bars at home? AT&T to offer $150 fix

By Peter Svensson (AP)

Mar. 24, 2010
[ONLINE]

NEW YORK—AT&T Inc. wireless subscribers who have poor reception at home will soon be able fix that, for $150.

The carrier said Wednesday that it is rolling out "femtocells," little boxes that work much like Wi-Fi routers, except that they send out cellular signals. When connected to the home's broadband modem, they pick up signals from the cell phones in the home and relay them through the Internet connection. In essence, they're small cell towers for the home.

Dallas-based AT&T is introducing the 3G MicroCell in mid-April in some markets, as yet unnamed. The rest of the country will follow over the next several months.

Sprint Nextel Corp. started selling femtocells for calls in 2008, and Verizon Wireless followed in early 2009. AT&T's femtocell, developed with Cisco Systems Inc., is more advanced than those, because it relays both calls and broadband data.

However, many of AT&T's most popular phones, such as the iPhone, don't need a femtocell for data access in the home, because they can use Wi-Fi.

While femtocells can help consumers, they also benefit carriers by offloading traffic from local cell towers. AT&T is adding $2 billion to its capital budget

this year to address problems with congestion on its network, apparently caused by heavy iPhone use.

AT&T is offering two ways of reducing the price of the 3G MicroCell. New subscribers to AT&T's home broadband service get a $50 mail-in rebate. Wireless subscribers who add a $20-per-month option to their calling plan that gives unlimited calls through a femtocell get a $100 rebate.

On the Net

- http://www.att.com/3gmicrocell

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Related articles

- AT&T Rolls Out Nationwide Femtocell Plan
  InformationWeek (blog) – Mar 25, 2010
- CTIA 2010: AT&T announces 3G Mircocell technology
  Examiner.com – Mar 25, 2010
- AT&T to Offer $149 Device to Boost Home 3G Signal
  Digital Media Wire – Mar 25, 2010

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- GSM
- EDGE
- Online Account Management

AT&T 3G MicroCell™

AT&T 3G MicroCell acts like a mini cellular tower in your home or small business environment. It connects to AT&T's network via your existing broadband Internet service (such as DSL or cable) and is designed to support up to four simultaneous users in a home or data applications like picture messaging and surfing the Web.

* * *

Device Features:

- Enhanced coverage indoors—supports both voice and data up to 5000 square feet

- Available unlimited minute plans—individual or FamilyTalk plans.
- 3G handset compatible—works with any AT&T 3G phone.
- Supports up to four voice or data users at once.
- Device is secure—cannot be accessed by unauthorized users, easy and secure online management of device settings
- Seemless call hand-over—start calls on your 3G MicroCell and continue without interruption, even if you leave the building.

Device Requirement:

- 3G wireless phone/ device
- Broadband service over DSL or cable
- Computer with Internet access for online registration

Additional Information:

- Installing your device near a window is strongly recommended to ensure access to Global Positioning System (GPS). A GPS link is needed to verify the device location during the initial startup.
- The 3G MicroCell device is portable. The device may be moved, provided the new location is within the AT&T authorized service area and properly registered online.

* * *

103,000	Approx. residents in Roswell
60%	Approximate percentage of cell phones per U.S. population
61,800	Expected number of Cell phone in Roswell
3%	Apparent market Share of T-Mobile in Roswell
1,854	Total T-Mobile subscribers in Roswell
39	Square miles in Roswell
1/2	Square miles impacted area
24	Approximate number of T-Mobile subscribers in impacted area
$75	T-Mobile cost for FemtoCell (estimated)
$1,782.69	Total T-Mobile expense to equip every customer in impacted area with service
$139,050	Total T-Mobile expense to equip every customer in Roswell with service

The Zoning Meeting of the Mayor and City Council was held on Monday, April 12, 2010 7:30 p.m., Mayor Jere Wood was presiding.

Councilmembers Present: Councilmember Jerry Orlans, Councilmember Betty Price, Councilmember Kent Igleheart, Councilmember Rebecca Wynn, Councilmember Richard Dippolito, and Councilmember Nancy Diamond.

Staff Present: City Administrator Kay Love; Deputy City Administrator Michael Fischer; City Attorney David Davidson; Community Development Director Alice Wakefield; Planning & Zoning Director Brad Townsend; City Planner Jackie Deibel; Transportation Director Steve Acenbrak; Community Relations Manager Julie Brechbill; Community Relations Coordinator Kimberly Johnson; Building Operations Technician Doug Heieren; and Deputy City Clerk Betsy Branch.

Welcome: Mayor Wood called the meeting to order and welcomed everyone present.

Pledge of Allegiance: John Albers

Mayor Wood reminded everyone to complete and mail in their Census 2010 forms.

Consent Agenda:

1. **Approval of March 29, 2010 Open Forum Meeting Minutes (detailed Minutes to replace Council Brief Minutes adopted on April 5, 2010) and approval of April 5, 2010 Council Brief Minutes.** *Administration and Finance*

Motion: Councilmember Orlans moved for **Approval of March 29, 2010 Open Forum Meeting Minutes (detailed Minutes to replace Council Brief Minutes adopted on April 5, 2010) and approval of April 5, 2010 Council Brief Minutes.** Councilmember Wynn seconded. The motion passed unanimously.

Regular Agenda:

Community Development—Councilmember Betty Price

1. Wireless Facility - T-Mobile South, LLC., Lake Charles Drive (adjacent to 1060 Lake Charles Drive)

Councilmember Diamond recused herself at this point in the meeting stating she resides in the path of this proposed cell tower.

Planning and Zoning Director Brad Townsend stated this is a request from T-Mobile regarding a proposed alternative tower structure to be located at 1060 Lake Charles Drive; an alternative tower structure is a man-made tree, or clock, or bell steeple. This proposed tower is to be within the opinion of Council, "camouflaged compatible with the area." The location of the proposed tower is west of Lake Charles Drive on approximately 2.8 acres; the subject property is currently vacant and zoned E-2, Single Family Residential. The proposed tower is to be constructed to represent a mono pine tree at a height of approximately 20-25 feet above the existing pine trees in the area. Photographs of existing towers of single mono pine trees were shown as well as maps indicating Roswell locations of existing cell towers, co-location towers, and the proposed cell tower location. Radio Frequency (RF) strength maps for the City of Roswell

area were shown; the location for the proposed T-Mobile alternative cell tower was identified on the RF frequency map. Aerial photographs were shown of homes which currently exist on all sides of the proposed location; setbacks from the existing property lines were identified; parcel lines were identified. It was noted that city staff received over 1,000 petition signatures and letters in opposition to this proposed cell tower.

Mr. Townsend stated staff recommends the proposed cell tower in an alternative location further west of the proposed location. The alternative location would represent the person/homeowner who would receive the greatest financial gain from the proposed cell tower, that person/homeowner would also receive the largest visual impact to the proposed tower.

Mr. Townsend stated staff recommended conditions are as follows:

1. The applicant/developer shall construct the mono-pine structure not to exceed 108 feet, located 120 feet east of the west property line and in conformance with the plans submitted to the City of Roswell Community Development Department stamped received "March 24, 2010."
2. The applicant/developer, T-Mobile shall construct a black vinyl fence with black screening so the facility equipment cannot be seen through the fence. The type of fencing shall be approved by the Roswell Design Review Board.
3. The applicant/developer, T-Mobile shall install thirty-three (33) evergreen trees around the lease area to screen the view of the structure and equipment facilities from the residential homes located to the east of the property. A

variety of evergreen trees and the placement of the trees shall be approved by the City Arborist and the Roswell Design Review Board.

Council Comment:

Councilmembcr Dippolito asked if the applicant had addressed staff's suggestion to move the tower. Mr. Townsend replied the applicant had not addressed the staff suggestion; that information was presented to the applicant approximately a week and a half ago. Councilmember Dippolito inquired about the height of the trees in staff's suggested alternative location. Mr. Townsend replied the trees are between 80 and 90 feet tall. Councilmember Dippolito stated regardless of where the proposed tower could be potentially located on the property, it would be "twenty eight to thirty eight feet higher than any of the trees." Mr. Townsend replied that was correct.

Mayor Wood requested City Attorney David Davidson to "advise Council on where we are as far as the system and their discretion in this matter."

City Attorney David Davidson stated the telecommunications act prohibits state or local governments from prohibiting the provision of wireless communication services or from passing regulations that have the effect of prohibiting such services. Federal law does preserve local zoning authority. The city has the ability to discuss and decide the placement, construction, and the modification of these facilities. There are limitations to that ability of the city; they cannot discriminate against certain carriers or favor a certain carrier; the city cannot make it so onerous that it actually prohibits the provision of such service. Federal courts have generally held that any ordinance that inhibits or limits the ability of any competitor to

enter into a market, violates the telecommunications act. Under City of Roswell ordinance, the city does have in its ability to decide whether the construction of a facility is aesthetically compatible to the surrounding properties; it can also decide that a height is too high. Mr. Davidson said "They do not require co-location; if they are trying to get co-location and get three carriers on this site, then obviously that is going to be a higher tower than just what T-Mobile would require." He further stated the city in the past, favored co-location to avoid several towers popping up around the city. Mr. Davidson said provided the company can show a demonstrated need for the provision of this service in the area the Council has the authority to decide the construction, the placement, and any kind of modification to the system. A previous attempt by T-Mobile to place a tower on the city's fire department property was rejected. T-Mobile has now come forward with another site. Mr. Davidson said there is the possibility with a denial of this site, and unless evidence shows otherwise, that it could be seen as prohibiting the provision of service. Mr. Davidson said "I have heard comments both ways that there is service here, it is just not that great, so that is something for this Council to decide, on how far they want to take this."

Applicant:

Lannie Greene, SAI Communications, agent for T-Mobile South, LLC, stated he has thirteen years experience in site acquisition and permitting for wireless sites. Mr. Greene stated one of their first steps is to look at the zoning ordinance of the city to determine the requirements of the particular jurisdiction they are attempting to go into. In addition, they look for other structures which may be available for

co-location. Mr. Greene stated T-Mobile considered the City of Roswell Zoning Ordinance and the Master Siting Plan as they looked for a location which would meet their requirements. T-Mobile first considered the fire station property and proposed a 150-foot structure for that location; the decision was made by the city not to move forward with that location. Mr. Greene said there are still coverage needs by T-Mobile in this particular area. He noted there are some other large tracts along Shallowford Road which T-Mobile did not approach, primarily based on the development of those properties; clearing and grading would be more significant due to the way the houses sit on those properties. He noted the target areas and surrounding areas are zoned primarily residential; more people are relying on their cell phones instead of their land lines for emergencies. Mr. Greene noted the city recognizes the benefit of using NIXLE system for email notification for its residents in the event of an emergency within the City of Roswell; NIXLE would be more effective if it was available to all residents of Roswell. He noted that competition between carriers keeps the cell phone rates lower; T-Mobile would not spend the money to build this site if there was not a need.

Marquise Lewis, T-Mobile RF (Radio Frequency) Engineering, stated the determination of T-Mobile's need for this area was based on data gathered. Ms. Lewis stated T-Mobile is unable to provide reliable in-vehicle and in-building coverage in the area between Shallowford Road and Woodstock Road. Their goal with the proposed site is to provide reliable coverage to residents and workers in that area and to provide contiguous coverage to sites that are already in the network while also introducing minimal overlap; minimize the number of sites and the height of the sites built in the area. The proposed 108-foot

mono pine structure is in the center of an area of need. She stated other options were considered as were sites which were not as ideally placed. She noted that some constituents were interested in the use of a Distributed Antennae System (DAS), an alternative way to provide wireless coverage in certain areas and situations. Ms. Lewis said that the DAS would not be a viable option in this particular situation. A DAS will generally place antennas below fifty feet in height; these are low powered antennas requiring a line of sight to the antenna coverage area. The topology, terrain, and foliage in the subject area would make it very difficult to provide the line of sight. Use of existing power pole structures will not work because there are not enough above ground structures to provide the level of reliability needed to provide. Ms. Lewis stated Georgia Power has limitations on use of their structures; wooden power poles are excluded from use, which eliminates quite a few of above ground power poles in the area. She reiterated that a DAS is not a viable option for T-Mobile in this situation. Ms. Lewis stated the best solution in the 108-foot mono pine located on Lake Charles Drive.

Council comment:

Councilmember Orlans inquired if DAS is known as or is similar to a micro cell system. Ms. Lewis replied DAS is considered micro cell technology.

Councilmember Dippolito asked if DAS is not viable because T-Mobile cannot physically get it to work or is it just that it is a more costly system which would not be financially viable fort-Mobile. Ms. Lewis responded that she thought it would be more costly; she evaluates the RF aspects, from an RF perspective, the terrain and the foliage with the structures in the area would not allow the line of sight specifications needed via

DAS. Councilmember Dippolito replied "The question was, it is just not feasible to make it happen or it is just more expensive and it is something that you prefer not to do.'" Ms. Lewis replied "With the current infrastructure, T-Mobile cannot achieve the level of reliability in the search area using a DAS system. It is not feasible for T-Mobile to obtain its objectives using the DAS system in this situation."

Mr. Greene stated the DAS micro cells are more favorable in a large facility such as a mall or airport. He said the subject site fits the city's code; the T-Mobile site will not be intrusive to the area; photo simulations show the site without leaves on the trees, which demonstrates there will be no significant impact upon the area. Property value reports could be discussed by Mr. Harris "Bo" Simpson.

Public comment:

Mike Nyden, 580 Indigo Drive, spoke on the following:

- Acknowledged the residents of various subdivisions in the Lake Charles area who helped with the preparation of presentations of Opposition to the proposed cell tower.
- Remarks regarding balloon test video, test.
- Photos of neighborhood location of proposed cell tower; existing cell towers; cell tower base stations.
- Expressed appreciation to City of Roswell employees Brad Townsend, Jackie Deibel.
- Maintaining quality of life in Roswell; impact proposed cell tower would have on neighborhood areas.

Cookie Levine, 1064 Lake Charles Drive, spoke on the following:

- Opposed to proposed cell tower.
- Appreciates Roswell's neighborhoods; need to be kept looking good.
- Offered her professional legal opinion; reviewed statutes and ordinances; agreed with City Attorney that the City of Roswell cannot reject cell towers within the city, but there is the ability of the city to control the placement, location, how constructed.

Ken Kavanaugh, 1305 Lake Charles Drive, spoke on the following:

- Opposed to proposed cell tower.
- Experience as commercial real estate consultant, broker, investor, and author.
- Telecom Act; case law supporting municipalities who have been successful in denying cell tower permits; telecom industry does not always win in court if their applications have been denied; neighborhood group has substantial evidence.
- Roswell has allowed 30 locations for communication antennas; 67 communication towers exist within a four mile radius of Lake Charles Drive, thereby eliminating the argument of prohibition of cellular service in the area.
- Adverse effect on migratory bird population.

Trudy Nyden, 580 Indigo Drive, spoke on the following:

- Opposed to proposed cell tower although she works in the telecommunications industry.
- Overview of T-Mobile history; future.

- Telecommunications Act of 1999 relates to cell phone service in cars.
- E-91 1 service; triangulation versus GPS.
- Katrina Rule pertains to the maintenance of power during a power loss event; generator(s), fuel, fuel storage not indicated on the proposed cell tower diagram but will be required when Katrina Rule is put back into effect.
- Changes in technology rapidly occur; use of micro cells will make cell towers obsolete.

Ish McQuillen, 2 Meeting Street, spoke on the following:

- Opposed to proposed cell tower although she is a T-Mobile cell phone customer.
- Refuted T-Mobile's claim of lack of service after conducting a two-hour drive study within five mile radius of proposed cell tower, no calls were dropped, service was clear.

Shari Ward, 600 Oakstone Drive, spoke on the following:

- Opposed to proposed cell tower.
- Experienced mortgage banker and appraisal background; professional opinion is that surrounding property will experience financial impact from the proposed cell tower.

Trent Orndorf, 180 Worthington Hills Trace, spoke on the following:

- Opposed to proposed cell tower; resides in another neighborhood that experienced decrease in property values just from the threat of cell tower going up in his neighborhood; blighted neighborhood impacts in the area.

Chris Buck, 325 Maycroft Court, spoke on the following:

- Opposed to proposed cell tower; lives less than 300 feet from proposed cell tower location.
- Health risks for growing children; long term impacts not studied.

Geoff Anderson, 1021 Lake Charles Drive, spoke on the following:

- Opposed to proposed cell tower; the tower would violate and do harm to the city statute to protect the health, safety, and welfare of the public, and to maintain the aesthetic integrity of the community.
- Attorney; offered to defend the City of Roswell, pro bono.

Jackie Graff, 1085 Lake Charles Drive, spoke on the following:

- Opposed to proposed cell tower.
- Concerns regarding decreased property values and possible health risks.

Kierstin Hale, 530 Waterford Way, spoke on the following:

- Lake Charles Drive construction and road closures at this time; signs posted in that area regarding proposed cell tower were not as visible.

John Albers, 530 Junction Point, spoke on the following:

- Consultant in the telecommunication industry; expertise in the technology and equipment.
- T-Mobile's chosen type of technology requires use of more towers; other carriers (Verizon and Sprint) use

different technology that allows towers to be further apart from one another.

- Significant technology changes will occur over the next couple of years.
- Valuation and sale; telecommunication companies are sold by their assets such as towers, cable, and infrastructure; the proposed cell tower will make T-Mobile's valuation higher than it is today; expects they will most likely sell in the next several years.
- Precedence created if approved.
- Opposed to proposed cell tower.

Earl Vick, resident of Roswell, spoke on the following:

- Enjoys living in Roswell.
- Expressed his appreciation to Mayor and Council for the excellent job they do for Roswell.

Applicant Rebuttal:

Mr. Greene stated he would address the concerns of the residents but would not address the case law that had been discussed. He stated photo simulations are not perfect; they were not required as part of the application. It may have been windy the day when the photo simulations were taken but he had faith that the consultant hired to do the photo simulations had the knowledge and "knew when that balloon was where it needed to be to take the photograph." Mr. Greene stated that Mr. Nyden's photograph was actually of a 150-foot tall mono pine for the fire station proposal. He further stated that the present proposal is for a 108-foot tall mono pine, to be 20 feet above the existing tree canopy. Related to staff's recommendation regarding additional plantings, Mr. Greene stated T-Mobile was willing to place a five foot buffer along the three

adjacent properties to the east. Mr. Greene added that he thought staff recommended surrounding the compound, but T-Mobile is willing to put a five foot landscape strip with Leyland Cyprus along Ms. Levine's property, and the other two properties to the east.

Mr. Greene referenced the area on a zoning map which he said was the most optimal to provide the coverage T-Mobile requires; this entire area is zoned residential from Woodstock Road to the Cobb County line and from Crossville Road to the south. Mr. Greene stated T-Mobile reviewed the City of Roswell ordinance; the ordinance states they can apply for a tower in a residential area based on certain criteria. He said the T-Mobile proposal met the criteria; certain required setbacks have been met. Mr. Greene stated the fire station site was shown on the "2003 Facilities Map" as a potential candidate. T-Mobile made the proposal but the city then decided they did want to move forward with that location. Mr. Greene said they dropped the height from that original proposal, to 108-feet. He was not aware of what Verizon or AT&T has in this area. He noted that T-Mobile still has a need for service in this area and will continue to search for a site which meets the ordinance; the NIXLE system will not work if the infrastructure is not there. Mr. Greene introduced Mr. Simpson.

Mr. Harris "Bo" Simpson, 2368 Academy Court, Atlanta, appraiser and consultant, stated he has 15 years of cell tower experience but it has constituted a small part of his business the past 10 years since the growth of the networks has not been as dramatic. Mr. Simpson explained that T-Mobile requested a study examining Fulton County cell towers, and an opinion as to whether or not cell towers have an impact on

property values. He stated residential properties sell most often and are the easiest location to try to prove or disprove whether this happens; they focused on close residential areas because they tend to be the setting where this most often comes up. Fulton County has many cell towers, over 1,000 were looked at; it was narrowed down to those which they felt were instructive, some which were close to subdivisions, some in subdivisions. Mr. Simpson stated the "perfect example for T-Mobile" is a brand new subdivision with a cell tower that can be seen from some homes and some homes from which it cannot be seen. Another example would be a brand new subdivision which is half built and half sold, and then a cell tower is built, and then the subdivision other half is built and sold. He said those examples were found; the empirical data was reviewed; it was discerned that cell towers do not have any influence on value. Mr. Simpson said "Typically residents are of the opinion that this is an obnoxious use" but his opinion is that cell towers companies go to a good bit of trouble to put them in a place that is not obnoxious and intrusive; this proposed cell tower would be an example; he offered to provide examples of cell towers and other types of towers which could easily be called obnoxious. After review of data collected and interviews with homeowners and people who buy and sell homes, their findings were that it doesn't influence their purchase decision and does not matter, although they may have a valid opinion. Mr. Simpson stated "If you put a house up for sale and two people come along and say really don't like that tower,' well, there are eight more people who come along and don't even notice it, they literally don't notice it." Mr. Simpson stated the proposed subject tower is to be 108-feet tall, disguised as a pine tree, which in his opinion, will have no

impact on value or appreciation rates. City staff was provided his study results.

Mr. Greene referred to a displayed photograph of a 199-foot tall self-supporting cell tower built in 2001, located on the south end of Chastain Park in Atlanta. He said evaluation studies conducted by Mr. Simpson prior to and after the tower was built showed there was no impact. Mr. Greene stated there is no blight in the Chastain Park area.

Ms. Lewis stated a comment was made that T-Mobile would be able to provide 911 services via several alternative methods. She stated using tri-angulation technology is not a replacement for building the new facility; T-Mobile is building the facility because they do not have adequate signal. The adjacent towers cannot serve the area; therefore, T-Mobile could not use that as a replacement to provide 911 services to constituents in the area, She stated that GPS technology was mentioned; it is not possible to request that every customer change their phone; every customer should be able to use their phone whether or not it has extra features such as UPS technology enabled on it. T-Mobile is trying to provide E-911 services and enable customers to carry a reliable call in their vehicles or in their homes. Ms. Lewis referring to a resident's conducted drive test, stated there are many variables which can come into play. She stated that T-Mobile is aware of their need; they cannot provide service up to its standard in vehicles and homes in the subject area they are designing for; length of calls; different access thresh-olds for live network, interference, other towers come into play. She reiterated that T-Mobile has a need in this area and is well within the FCC standards for "MPE compliance" with this facility. Ms. Lewis

referring to the statement regarding inferior technology stated "T-Mobile is on the cutting edge of technology; in fact, T-Mobile is deploying UMTS technology nationwide and that is very close to the technology that is used by Verizon and Sprint." Ms. Lewis stated "It is not the technology, there are so many different factors that come into play." She mentioned they are limited to the frequencies that are licensed to T-Mobile and could not really speak about Verizon's or Sprint's network.

Council comment:

Councilmember Dippolito said he thought he had read about micro cell service through T-Mobile. Ms. Lewis stated T-Mobile does provide micro cells but it depends on the situation; T-Mobile does provide DAS depending on the particular situation. She noted that micro cells would not be an appropriate solution for this area. Ms. Lewis further stated that the primary areas for micro cells, or distributed antenna technologies, are campus environments, very small concentrated area where there are a lot of users but there is a relative open area with no obstructions which would prevent line of sight with the antennas and an expansive area is not being covered. Councilmember Dippolito asked if micro cell and DAS technology are interchangeable, the same technology. Ms. Lewis stated that was correct, for the most part.

Mr. Greene, in summation, stated that T-Mobile submitted an application to the City of Roswell going "above and beyond your requirements" providing a very complete application and proven a need. He thanked Brad Townsend and Jackie Deibel from the Community Development department and respectfully requested approval of the application.

Council comment:

Councilmember Wynn inquired how T-Mobile would provide/guarantee continuous power for 911 service; noted the lack of generator shown on the site. Mr. Greene responded that if the City Council so desired, they could place a generator on the site. Councilmember Wynn asked what T-Mobile's policy is to ensure continuous operations of service to their customers. Mr. Greene responded that current T-Mobile policy is that they do not include generators with their sites; therefore, if the power were to go out, the site would lose power and there would be no service. He further explained that engineers would go out to the site; there would be a three hour back-up battery at the site which should provide enough time to get the site back on the air, depending on the situation. If a situation arises where there are multiple sites out of service, they could promise that they would be out there in three hours.

Councilmember Orlans stated he has served on Council for 17 years and was most impressed with the information put together by the citizens. He commented that perhaps some of it should even be forwarded on to Washington, D.C. Councilmember Orlans also complimented and thanked the applicant for the completeness of the T-Mobile application.

Councilmember Igleheart agreed that both sides did a lot of work. Councilmember Igleheart stated "apparently other carriers have sufficient coverage" and noted his concern with the capabilities of some of the various carriers; the city is not mandated to level the field for inferior technologies but is mandated to consider anything which impacts our residents. Couneilmember Igleheart stated the city currently allows cell towers in C-3 and I-1, commercial and

industrial zoning; in any other zoning category, such as residential, towers are conditional requiring Council consideration of all the aspects. He stated "I think we are making a mistake to open up all the various properties throughout the city for this process. We have tried a few times to deal with that, but once again we have to work on a plan to try and deal with the quickly progressing technologies and make it to where every other neighborhood does not have to come through this yet again every few months or every few years." He said "I do not think that it is appropriate for residentially zoned properties to have the cell towers in their locations."

Mayor Wood noted that Councilmember Igleheart had raised a point and asked City Attorney David Davidson to discuss how the courts would respond if a city ordinance restricted cell towers in residential zones. Mr. Davidson replied the courts would be able to show that it would prohibit service in certain areas of the city because Roswell is very residential in nature. Mr. Davidson further stated "I do not think we could prohibit it from all residential zones." Mayor Wood further stated that if the city did choose to pass such an ordinance there would be a strong possibility that our ordinance would be stricken down. The Mayor asked what would happen once the city's ordinance was struck down. Mr. Davidson replied "Hopefully, we could enact a moratorium until we could adopt another ordinance." Mayor Wood asked if it was correct that if the ordinance was stricken down, they could put in a cell tower without the city's permission. Mr. Davidson replied that was correct and he would not recommend taking the action suggested by Councilmember Igleheart at this time.

Councilmember Dippolito agreed with the previous Council comments made regarding the application and stated that T-Mobile had done an admirable job with the information submitted. He said the residents went above and beyond anything which he had seen while on the City Council with concise information that seemed to be quite factual and commended them for their effort and presentation. Councilmember Dippolito said he thought it would be difficult to look at a cell tower such as this and to not consider that it would have an adverse effect impact on the residential area; it is a significant change from what is in that area. He did not think that it is compatible with the natural setting and would not support it.

Councilmember Wynn agreed with Council comments regarding the information and presentations made by the residents and the effort put into it. She noted that she has been on Council almost three years but has been a community advocate for 15 years. She agreed with Councilmember Dippolito that this proposed cell tower is not compatible with this area and said she would vote against it.

Councilmember Price thanked the applicant for the completeness of the application and expressed her appreciation to the residents. She noted that T-Mobile had not responded with an answer to Planning and Zoning Director Brad Townsend's question whether they were willing to compromise the location.

Councilmember Price stated that based on the City's ordinance Article 21.2.1, (the purpose and intent of the cell phone ordinance to protect the residential areas; to minimize the adverse impact of telecommunication towers, and to minimize the number of towers) she concluded that this would be aesthetically incompatible. This area is certainly other than a

I-1, C-3, office business or highway commercial area. In her opinion, the alternative proposed tower would not be compatible with the natural setting and surrounding structures, also due to the height being greater than the other trees. Councilmember Price stated that also based on the City's ordinance Article 21.2.4, the proximity to residential structures, the nearness to other homes, being within the residential zoning area, adjacent properties, adverse effects to the enjoyment of those neighbors, and the potential loss of resale value, among other potential parameters that are difficult to definitively assess, she would move to deny the application for the monopine tower.

Motion: Councilmember Price moved to deny the application for the **Wireless Facility monopine tower - T-Mobile South, LLC., Lake Charles Drive (adjacent to 1060 Lake Charles Drive)**. Councilmember Orlans and Councilmember Wynn seconded. The motion passed unanimously.

The remaining agenda items were called out of order.

2. RZ10-02, 1266 Minhinette Drive, site plan approval.

Planning and Zoning Director Brad Townsend stated a petition for RZ06-46 was to rezone 1266 and 1253 Minhinette Drive from R-2 to R-3A was denied by Mayor and Council on March 12, 2007. Per a court order, the City of Roswell rezoned the property located at 1266 and 1253 Minhinette Drive on May 11, 2009. A requirement of that rezoning was that any development on the property would require a site plan approval from Mayor and Council. Applicants Lew Oliver and Alfredo Ortiz submitted an application for a site plan. Mr. Townsend stated "that site plan takes the individual lot and separates it into two single-family lots." The site plan requires a minimum lot

width variance from eighty (80) to fifty-five (55) feet. The Planning Commission reviewed and approved the application at their March 16, 2010 meeting with the following two staff conditions:

1. The subject property shall be limited to two single family homes and developed in accordance with the site plan received by the City of Roswell's Community Development Department on January 27, 2010.
2. A Division Plat must be submitted and recorded with both the City of Roswell and Fulton County prior to the issuance of a grading or building permit.

Mr. Townsend identified the current area on the zoning map; an aerial photograph of the surrounding properties was displayed. The proposed site plan was displayed, identifying the fifty-five foot minimum lot width for the individual two lots. Mr. Townsend stated staff recommended approval with the two conditions as proposed.

Council comment:

Councilmember Dippolito stated the site plan only shows improvements to a portion of the property but the entire property was zoned; he asked how will this impact the remaining Betty Ann Nations' property. Mr. Townsend answered "That subject property will be required to receive site plan approval prior to their land disturbance permit, as per the zoning condition." Councilmember Dippolito asked "If the subject property uses up two of the units, then she is allowed three units on her property." Mr. Townsend replied yes, if they are able to conform with the requirements of the R-3 zoning. Mr. Townsend

* * *

PETITIONER'S BRIEF

JUL - 3 2014

No. 13-975

IN THE

Supreme Court of the United States

T-MOBILE SOUTH LLC

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In order to promote the prompt deployment of telecommunications facilities and to enable expedited judicial review, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any "decision" by a state or local government denying a request to place, construct, or modify a personal wireless service facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

The question presented is whether a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory requirement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner T-Mobile South LLC references the Rule 29.6 Statement included in its Petition for Certiorari.

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BRIEF FOR PETITIONER

Petitioner T-Mobile South LLC respectfully requests that the judgment of the United States Court of Appeals for the Eleventh Circuit be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 731 F.3d 1213 and is reproduced at Pet. App. 1a-18a. The relevant opinion of the district court is unpublished and is reproduced at Pet. App. 19a-35a.

JURISDICTION

The Eleventh Circuit issued its opinion on October 1, 2013. Pet. App. 1a. On December 20, 2013, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including February 13, 2014. *See* No. 13A614. This Court granted a writ of certiorari on May 7, 2014. *See* 134 S. Ct. 2136 (2014). The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the Telecommunications Act of 1996 are reproduced in the Statutory Appendix at the end of this Brief.

STATEMENT OF THE CASE

This case presents an important issue concerning one of the "limitations" that, in order to facilitate the growth of the wireless communications industry, the Telecommunications Act of 1996 imposes upon the authority of local governments.

A. Statutory and Factual Background

1. For most of the twentieth century, the Nation's communications marketplace was dominated by government-sanctioned and regulated monopolies. Consumers had no choice among providers of telephone service. Nor did they have any choice in the technology that provided the service.

During the 1980s and early 1990s, the Federal Communications Commission ("FCC") began to allow the deployment of some competitive wireline long-distance service. The FCC also began to facilitate the introduction of some wireless telecommunications services. *See generally Amendment of the Commission's Rule to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd. 7700 (1993); Peter W. Huber, Michael K. Kellogg, & John Thorne, *Federal Telecommunications Law*, §§ 10.1 & 10.2 (2d ed. 1999). Yet, the overwhelming majority of telecommunications services still continued to be provided only by government-regulated monopolists.

Congress enacted the Telecommunications Act of 1996 ("1996 Act"), which amended the Communications Act of 1934 (the "Act"), to significantly alter this landscape. The 1996 Act is designed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications

consumers." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). It also is intended to "encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996); *see also City of Rancho Palos Verdes*, 544 U.S. at 115; H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (1996) (purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition").

Consumer wireless telecommunications service – or cell phone service – is one of the key technologies that Congress intended to open to competition in the 1996 Act. Although only a nascent technology in 1996, Congress foresaw that the rapid deployment of wireless telecommunications services could reap great benefits for individuals and businesses alike. At the same time, Congress recognized that this deployment could occur effectively only by opening up markets to enable competition. Yet, "current State and local requirements, siting and zoning decisions by non-federal units of government," Congress observed, "have created an inconsistent and, at times, conflicting patchwork of requirements which [would] inhibit the deployment of" wireless facilities such as towers and antennas. H.R. Rep. No. 104-204, pt. 1, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 60, 61 (1996); *see also City of Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring); *Amendment of the Commission's Rules to Establish Part 27, the*

Wireless Communications Service, Report and Order, 12 FCC Rcd. 10785, ¶ 90 (1997) (noting that "zoning approval for new [wireless] facilities" has historically been "both a major cost component and a major delay factor in deploying wireless systems").

To break down local regulatory barriers to the effective deployment of wireless infrastructure and services, Section 332(c)(7)(B) of the 1996 Act "imposes specific limitations on the traditional authority of [S]tate and local governments to regulate the location, construction, and modification of [personal wireless] facilities." *City of Rancho Palos Verdes*, 544 U.S. at 115. Some of these limitations are substantive, while others are procedural.

On a substantive level, Section 332(c)(7)(B) prohibits local zoning authorities from unreasonably discriminating among providers; issuing decisions that effectively prohibit the provision of personal wireless services; denying applications without support of substantial evidence; or from regulating the deployment of wireless services on the basis of environmental effects of radio waves that comply with FCC specifications. 47 U.S.C. §§ 332(c)(7)(B)(i), (iii), & (iv).[1]

On a procedural level, the statute requires that local governments act on any request for

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[1] The 1996 Act also imposes other substantive limitations on local authority – for example, prohibiting state and local authorities from regulating the market entry of, or rates charged by, personal wireless services providers, 47 U.S.C. § 332(c)(3), and prohibiting state and local actions that may have the effect of prohibiting the provision of telecommunications services, 47 U.S.C. § 253.

authorization to place, construct, or modify personal wireless service facilities "within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii); *see also City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (upholding FCC Declaratory Ruling specifying time periods). Section 332(c)(7)(B) also creates a system for subjecting denials of such requests to judicial review. It allows "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph" to file a lawsuit "within 30 days after such action or failure to act." 47 U.S.C. § 332(c)(7)(B)(v). It then mandates that "[t]he court shall hear and decide such action on an expedited basis." *Id.* And to facilitate this system of expedited review, Section 332(c)(7)(B) requires – in the provision directly at issue in this case – that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

The competition-enhancing reforms of the 1996 Act have helped the United States become an increasingly technologically mobile society. Consumer use of smartphones, tablets, and other mobile devices has skyrocketed in recent years – a trend that will likely continue for the foreseeable future. *See, e.g., Riley v. California*, Nos. 13-132, 13-212, 2014 WL 2864483, at *9 (U.S. June 25, 2014) (noting that modern cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy");

Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, ¶ 2 (2013) ("*2013 Wireless Broadband NPRM*"); Centers for Disease Control, Wireless Substitution: Early Release of Estimates From The National Health Interview Survey, January-June 2013 at 1 (Rel. Dec. 2013) (reporting that 39.4% of all households have eliminated wireline telephone service and now rely solely on wireless service). But to meet burgeoning consumer demand, wireless service providers – particularly upstart companies seeking to fulfill the 1996 Act's goals of increasing competition and lowering prices – must have the necessary infrastructure in place. *See, e.g., 2013 Wireless Broadband NPRM*, 28 FCC Rcd. 14238, ¶ 2. This means deploying increasingly tightly stitched networks of wireless facilities (including cell towers) to reach the places where consumers live and work. *See, e.g., id.*; *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 41 (1st Cir. 2009).

2. Petitioner T-Mobile South, a subsidiary of T-Mobile USA, Inc., is a provider of wireless voice and data services. Founded in 1994 (then known as VoiceStream Wireless), T-Mobile has sought since the passage of the 1996 Act to compete with "incumbent carriers," such as AT&T and Verizon, that have developed from the traditional monopoly "Bell" companies and that now overwhelmingly dominate the market. To that end, T-Mobile strives to offer a competitive alternative to consumers (with superior service at lower rates, but without tying consumers to restrictive multi-year service contracts).

T-Mobile is now the fourth largest wireless carrier in the country, and is the Nation's fastest

growing wireless provider – serving some 49 million subscribers. *See T-Mobile, Facts at a Glance*, http://newsroom.t-mobile.com/content/1020/files/TMUS%20Fact%20Sheet_6_4_14_Branded.pdf. In the first quarter of 2014, T-Mobile added more customers than its three larger competitors combined. Competing at this level requires T-Mobile to continually invest in new and better infrastructure. While customers want to save money on cell phone bills, they generally do not want to sacrifice coverage or speed of service.

As part of its nationwide efforts to deploy infrastructure to meet consumer demand, T-Mobile determined in 2010 that it needed an additional personal wireless service facility in a residential area in Respondent the City of Roswell, Georgia ("the City"), a suburb of Atlanta. It, therefore, applied to the City for a permit to construct a 108-foot cell tower, disguised as a pine tree, on a 2.8-acre, vacant parcel of property.

The Planning and Zoning Division of the City's Community Development Department reviewed T-Mobile's application and found that it met all the requirements of the City code's standards for wireless facilities. Pet. App. 4a. The Planning Department further recommended that the City approve the application with certain modifications. *Id.*

On April 12, 2010, the City Council considered the application at a public hearing. The hearing lasted over two hours (reflected in 108 pages of transcript), and produced a range of divergent views on the application. During the first part of the hearing, some T-Mobile representatives and local residents spoke for and against the proposal. T-Mobile also submitted evidence in the form of

photographs "showing that the tower would be virtually invisible from surrounding properties" and several studies showing that such towers "ha[ve] no detrimental effect" on property values. Pet. App. 31a. Later, certain councilpersons expressed concern or outright opposition to the application. They suggested, among other things, that "other carriers apparently have sufficient coverage in this area"; that the cell tower would be "aesthetically incompatible with the natural setting and surrounding structures"; and that the cell tower might not be able "to provide continuous emergency power for 911 services." Pet. App. 7a-8a, 28a-29a. Another councilperson simply asked follow-up questions of T-Mobile, Pet. App. 28a, and a final councilperson recused herself and never spoke at all. J.A. 111.

Near the end of the discussion, one councilperson, Dr. Betty Price, spoke out against the application. Referencing a local ordinance designed to "minimize the number of towers," she argued that "the proposed cell phone tower would be aesthetically incompatible with natural setting and surrounding structures, particularly due to the tower's height being greater than the surrounding trees." Pet. App. 7a-8a. Dr. Price further mused that "the adverse effects to the enjoyment of th[e] neighbors and the potential loss of resale value among other potential parameters are difficult really to definitively assess." *Id.* 8a.

After expressing her views, Dr. Price moved to deny the application. The members who were present and eligible to vote unanimously passed the motion. J.A. 177, 340. No one ever identified which of the various concerns expressed at the meeting

constituted the City's official reasons for denying the permit.

Two days later, the City mailed T-Mobile a letter. The letter stated in full:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number]. If you have any additional questions please, contact me at [phone number].

Pet. App. 9a; J.A. 278.

The minutes of the hearing were not available at the time T-Mobile received this letter. Twenty-six days later, they were finally approved and published. *See* J.A. 321-41 (minutes); Minutes of Hearing, http://roswell.legistar.com/MeetingDetail.aspx?ID=101786&GUID=63828B21-EB83-4485-B4EA-10EE65CF48CD&Search (noting approval and publication of minutes on May 10, 2010). The minutes "summarize the testimony of experts and concerned citizens, along with comments and questions from councilmembers." Pet. App. 15a. They also recount the concerns that Dr. Price expressed before moving to deny T-Mobile's application. *Id.* But nothing in the minutes ascribes those concerns or any other concern to the Council as a whole.

B. Procedural History

1. Invoking the 1996 Act's judicial review provisions, T-Mobile timely filed an action in the U.S.

District Court for the Northern District of Georgia, challenging the City's denial of its application and seeking an injunction that would require the City to issue the requested permit. J.A. 34-62. Among other provisions of the Act, T-Mobile contended that the City's unexplained denial letter violated Section 332(c)(7)(B)(iii)'s requirement that decisions denying applications such as this be "in writing and supported by substantial evidence."

The district court granted summary judgment to T-Mobile and ordered the City to allow T-Mobile to install its wireless communications facility. Pet. App. 35a. Reading the statutory phrase "decision . . . in writing and supported by substantial evidence" in light of Section 332(c)(7)(B)(iii)'s purpose of facilitating expedited judicial review, the district court adopted the interpretation of that provision followed by a majority of federal courts of appeals that have addressed the issue. Pet. App. 27a. Under the majority interpretation, a decision denying an application concerning a personal wireless facility must be separate from the written record and "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Id.* 26a (quoting *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001), and citing *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 722-23 (9th Cir. 2005)). Thus, "even where the written record may offer some guidance as to the board's rationale," a denial letter violates Section 332(c)(7)(B)(iii) where that separate writing itself does not identify the reasons for the denial. *Todd*, 244 F.3d at 60.

In the district court's view, this case exemplified the good sense behind that rule. The City argued that "its letter of denial satisfies the 'in writing' requirement because it refers to the minutes of the hearing and there is also a transcript of the hearing." Pet. App. 28a. But, as the district court pointed out, the written record "reflects a number of different reasons that may have motivated individual Council members to vote to deny T-Mobile's application." *Id.* 30a. As a result, the district court found it "impossible . . . to discern which of these reasons motivated the Council as a whole or commanded the support of a majority of the Council members." *Id.*

Moreover, the denial letter's bare reference to the minutes "left [the court] to review this voluminous record without any guidance as to what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id.* 32a. For example, "insofar as the Council relied on evidence regarding the proposed tower's adverse effect on aesthetics and property values," it was "impossible" for the court "to determine whether [the Council] found that this particular tower would have an adverse effect in this particular neighborhood, or instead, that any cell tower would have such an effect" – a finding that "would be insufficient to justify denial of a permit." *Id.* "Absent some explanation of the rationale for the City Council's denial of T-Mobile's application," the district court was simply unable to conduct "meaningful judicial review." *Id.* 28a (quoting *Todd*, 244 F.3d at 60), 32a.

2. The Eleventh Circuit reversed. The court of appeals did not dispute that under the majority interpretation of Section 332(c)(7)(B)(iii) T-Mobile

would prevail. But, reaffirming its intervening decision in *T-Mobile South LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the Eleventh Circuit expressly rejected the majority construction of Section 332(c)(7)(B)(iii). Pet. App. 14a. Joining the Fourth Circuit, the Eleventh Circuit held that a written document announcing the bare conclusion that an application was "denied" can satisfy Section 332(c)(7)(B)(iii). Pet. App. 12a-13a; *see also AT&T Wireless PCS, Inc. v. City Council of City of Va. Beach*, 155 F.3d 423, 429 (4th Cir. 1998); *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312 (4th Cir. 1999). The Eleventh Circuit added that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." Pet. App. 13a (quoting *City of Milton*, 728 F.3d at 1285).

The Eleventh Circuit ruled that the City satisfied the court's standard because (1) the City sent T-Mobile "a letter explicitly denying T-Mobile's request; (2) [the] minutes summariz[e] the April 12, 2010 hearing and recount[] the reasons for the denial; and (3) a verbatim transcript of the April 12, 2010 hearing during which the City Council denied the request" also exists. Pet. App. 16a.[2] The Eleventh Circuit did not attempt to pinpoint which reasons, among the various concerns expressed in the latter

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[2] The Eleventh Circuit stated it was "unclear whether T-Mobile hired the court reporter to transcribe the hearing," Pet. App. 16a, but T-Mobile in fact did so. Had T-Mobile not taken this initiative, no written transcript of the hearing would exist.

two documents, constituted the City's actual reasons for denying the application. Instead, the Eleventh Circuit simply remanded to the district court – the same district court that has already combed through those documents and found it impossible to discern why the City denied the application – for further proceedings. Pet. App. 18a.

3. This Court granted certiorari. 134 S. Ct. 2136 (2014).

SUMMARY OF THE ARGUMENT

The City violated Section 332(c)(7)(B)(iii) when it issued a letter denying T-Mobile's application for a permit to construct a cell tower but failed to specify any reasons for doing so.

I. Section 332(c)(7)(B)(iii) requires "[a]ny decision" denying a permit request concerning a personal wireless facility to "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). The phrase "supported by substantial evidence" is a term of art in administrative law – the customary standard for reviewing agency action – and invokes the cluster of principles traditionally attached to that standard. Foremost among those principles is the requirement that the agency specify its reasons for the action at issue. Only then can the judiciary perform its statutory mandate of assessing whether those reasons have adequate grounding in the administrative record.

The Eleventh Circuit focused on a different phrase in the statute – "in writing" – and reasoned that so long as a local government transmits the word "denied" in written form, it has satisfied the statute. But such reasoning ignores this Court's

repeated admonition that statutory terms must be read in context, not in isolation. The statute's "in writing" directive is designed to facilitate judicial review, and simply requiring decisions to be issued in written – as opposed to oral – form would fail to achieve that objective. Furthermore, allowing local agencies simply to transmit the word "denied" without any reasoning would contravene the statute's use of the word "decision" as the object of the "in writing" modifier. A "decision," as opposed to a mere "notification," implies a transmission of reasons, not merely an announcement of an outcome.

This analysis holds even where, as here, a local agency's transmittal of its denial includes an invitation to obtain the minutes of a hearing or any other part of an administrative record – and even where various concerns or objections regarding the application can be found in that record. "A written record can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board." *Todd*, 244 F.3d at 60. Only by requiring the document transmitting the denial to the applicant to include "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," *id.*, can a reviewing court be sure to know the rationale of the local government *as a whole* for denying the application.

Two other structural elements of Section 332(c)(7)(B) reinforce this reading of subsection (iii). First, subsection (v) requires courts to review permit denials "on an expedited basis." If courts first had to

comb though lengthy administrative records in search of reasons for such denials, they would be unable to hear and decide these cases in an efficient manner. Second, as numerous federal courts of appeals have recognized, substantial-evidence review under Section 332(c)(7)(B)(iii) forbids local governments from defending permit denials based on post hoc rationales. But only if local authorities are required to specify the reasons in the first place can courts know which reasons were actual reasons for denials – and evaluate those reasons for substantial evidence.

The purpose and legislative history of Section 332(c)(7)(B) are in accord. Congress sought in the Telecommunications Act of 1996 "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition." H.R. Rep. No. 104-458, at 113 (Conf. Rep.), 1996 U.S.C.C.A.N. at 124. Section 332(c)(7)(B) is designed to achieve that objective by preventing local governments from imposing "impediments [to] the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes*, 544 U.S. at 115. Allowing local governments to issue unreasoned denials, thereby generating obfuscation and delay, would thwart these goals – particularly with respect to carriers such as T-Mobile, which are attempting rapidly to deploy wireless infrastructure for exactly the reasons Congress envisioned when it passed the 1996 Act, while engaged in competition with larger carriers. The Eleventh Circuit's holding also contradicts Congress's expectation that courts would judge permit denials against "the traditional

standard used for judicial review of agency actions." H.R. Rep. No. 104-458, at 208 (Conf. Rep.), 1996 U.S.C.C.A.N. at 222-23.

II. Allowing local zoning authorities to issue unreasoned denials would also pose serious administrative difficulties. Records compiled in connection with permit applications can include statements from local residents, paid experts, agency personnel, and others. Such persons often express wildly divergent reasons for opposing applications. The judiciary should not be saddled with the task of determining which of these statements count as the official reasons for denying permits. Indeed, requiring the district court to first identify the local government's reasons for denial risks attributing to the local government reasons that the local government did not intend.

This case perfectly illustrates the administrative difficulties. After surveying the "voluminous" administrative record, the district court found it "impossible . . . to discern which of the[] reasons [expressed in the hearing and the minutes] motivated the Council as a whole or commanded the support of a majority of the Council members." Pet. App. 30a, 32a. This inability posed a significant problem, because at least some of the concerns expressed in the record would have violated the 1996 Act and others lacked any substantial evidentiary support. In the face of such uncertainty, the district court had no choice but to correctly find a violation of Section 332(c)(7)(B)(iii). The Eleventh Circuit's ruling should be reversed.

ARGUMENT

I. Customary Tools Of Statutory Construction Dictate That A Document Stating That An Application Has Been Denied, But Providing No Reasons For The Denial, Violates Section 332(c)(7)(B)(iii).

The text, structure, purpose, and legislative history of Section 332(c)(7)(B)(iii) dictate that decisions denying applications to place, construct, or modify a personal wireless service facility must be separate from the administrative record and must identify reasons for the denial.

A. Text

1. We begin with the text, and with this Court's familiar admonition that "[s]tatutory interpretation is a holistic endeavor." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks and citation omitted). Thus, "[i]n expounding a statute, [this Court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013) (quoting *U.S. Nat'l Bank of Or. v. Independent Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting in turn *United States v. Heirs of Boisdore*, 8 How. (49 U.S.) 113, 122 (1849))). Furthermore, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning . . . , it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952); *accord FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012);

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991).

When a local authority denies a permit concerning a personal wireless facility, Section 332(c)(7)(B)(iii) requires it to issue a "decision . . . in writing" that is "supported by substantial evidence." The phrase "supported by substantial evidence" is a term of art in administrative law – the "traditional" standard used for reviewing agency actions. *Friends of the River v. FERC*, 720 F.2d 93, 98 (D.C. Cir. 1983) (Ginsburg, J.).

This Court initiated this tradition nearly a century ago, before the Administrative Procedure Act of 1946 reduced the rules governing judicial review of most agency action into a detailed statutory regime. In 1938, this Court explained that the phrase "substantial evidence" "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). And in subsequent cases, this Court established the equally important corollary that the requirement that agency action be supported by substantial evidence presupposes that the agency must identify reasons for its actions.

For example, in *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), this Court set aside an order of the Interstate Commerce Commission because the agency failed to set forth reasons for its decision. This Court explained that when Congress provides for judicial review of agency action, the duty of the courts is to ensure that Congress's "policies be executed" – that is, to ensure that the agency has abided by statutory limitations on its authority and not taken action on any impermissible ground. *Id.* at 489. "If that inquiry is

halted at the threshold by reason of the fact that it is impossible to say whether or not those [statutory] standards have been applied, then that review has indeed become a perfunctory process." *Id.* Hence, this Court stressed that the requirement to provide reasons "is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." *Id.*

This Court elaborated on these principles in the seminal *Chenery* decisions. Refusing to accept an agency order lacking any specification, this Court reaffirmed that "the orderly functioning of the process of [substantial-evidence] review requires that the grounds upon which the administrative agency acted be clearly disclosed." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery I*"). "[C]ourts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *Id.* Put another way: "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) ("*Chenery II*").

Numerous other cases confirm that an indispensible element of substantial-evidence review is that the agency provide reasons for its decision. *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) ("A reviewing court reviews an agency's reasoning to determine whether it is . . . supported by 'substantial evidence.'") (citing *Chenery I*, 318 U.S. at 89-93); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Life. Ins. Co.*, 463 U.S. 29, 43, 44 (1983) (the

agency must "articulate a satisfactory explanation for its action" to enable judicial review of whether agency's decision is "supported by 'substantial evidence on the record as a whole") (citation omitted); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) ("[F]or the courts to determine" whether an agency has acted within its statutory authority, "[t]he agency must make findings that support its decision, and those findings must be supported by substantial evidence."); *see also* Harry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1292 (1975) (describing, and agreeing with, traditional rule that "[a] written statement of reasons" for agency action is "almost essential if there is to be judicial review").[3]

When read against the backdrop of the traditional requirement that agencies subject to substantial-evidence review must identify reasons for their actions, it is fully apparent – as some Members

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[3] Even when Congress has not seen fit to subject agency action to judicial review, persons may sometimes bring suit to challenge the adequacy of state administrative procedures when liberty or property interests are at stake. In such circumstances, this Court likewise has held that "the minimum requirements of procedural due process" require "a written statement by the factfinders as to the evidence relied on and reasons" for the agency's actions. *Wolff v. McDonnell*, 418 U.S. 539, 563, 564 (1974) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). The Model State Administrative Procedure Act also provides as one of its "minimum procedure requirements" that "[t]he decision in a contested case must be based on the hearing record and contain a statement of the factual and legal bases of the decision." Uniform Law Commission, Revised Model State Administrative Procedure Act § 403(j) (2010).

of this Court have already observed – that Section 332(c)(7)(B)(iii) "requires local zoning boards . . . [to] *give reasons* for [their] denials in writing." *City of Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., joined by Ginsburg, Souter, and O'Connor, JJ., concurring) (emphasis added). Just as with other statutes subjecting agency action to substantial-evidence review, Section 332(c)(7)(B)(iii) exists against the backdrop of a judicial review regime and prohibits denying permits based on beliefs lacking substantial evidence support in the administrative record. Section 332(c)(7)(B) also imposes other substantive restrictions against denying permits for certain impermissible reasons. *See* 47 U.S.C. §§ 332(c)(7)(B)(i) & (iv). Courts cannot enforce these restrictions if local agencies do not specify why they did what they did. Accordingly, when a local zoning authority issues a letter denying a permit but fails to identify any reasons for its action, the issuance is not a "decision" that is "supported by substantial evidence." 47 U.S.C. § 332(c)(7)(B)(iii).

This remains so even where, as here, a local agency's transmittal of its denial includes an invitation to obtain the minutes of a hearing or any other part of an administrative record – and even where various concerns or objections regarding the application can be found in that record. As the First Circuit has explained, "[a] written record can create difficulties in determining the rationale behind a board's decision, particularly when that record reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board." *Todd*, 244 F.3d at 60. Only by requiring the document transmitting the denial to the applicant to

include "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons," *id.*, can a reviewing court be sure to know – as the district court here needed to know – "the rationale of the Council *as a whole* for denying the application." Pet. App. 28a (emphasis added). And only by knowing that rationale can a court actually assess whether the decision to deny the permit is supported by substantial evidence.

2. The Eleventh Circuit – in this case and in its previous holding in *T-Mobile South LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013) – resisted this reading of Section 332(c)(7)(B)(iii) on textual grounds. Focusing exclusively on the words "in writing," the Eleventh Circuit held that the alleged "plain meaning" of the statute requires nothing more than that local zoning authorities transmit denials in written – as opposed to oral – form. Pet. App. 12a-14a. The Eleventh Circuit implicitly acknowledged that this bare-bones interpretation of Section 332(c)(7)(B)(iii) would thwart the provision's purpose of enabling expedited judicial review. *See City of Milton*, 728 F.3d at 1284-85. But the court of appeals declared that it was powerless to give effect to that intent. "We must . . . take the model that Congress has constructed," the Eleventh Circuit asserted, "perceived defects and all." *Id.* at 1284.

Though cast as judicial modesty, this reasoning actually subverts Congress' work for no legitimate reason. As this Court has said time and again, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Accordingly, "a court should not interpret each word in a statute with blinders on,

refusing to look at the word's function within the broader statutory context." *Abramski v. United States*, 134 S. Ct. 2259, 2267 n.6 (2014); *see also Porter v. Nussle*, 534 U.S. 516, 527 (2002) (each statutory term should be construed "not in isolation, but 'in its proper context'") (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). Indeed, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

That is precisely the case here. Whatever the words "in writing" might indicate in a vacuum, the import of those words – when read in tandem with Section 332(c)(7)(B)(iii)'s "substantial evidence" requirement and the statutory scheme of Section 332(c)(7)(B) – is clear: Denials of permit applications must identify the reasons for the zoning authorities' actions so as to facilitate the judicial review that Section 332(c)(7)(B) contemplates. As one court of appeals has put it, "[i]f [judicial review for substantial evidence] is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record." *MetroPCS*, 400 F.3d at 722.

That is particularly so in light of the fact that any permit denials must be based on criteria set forth in "applicable state and local law." *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 798-99 (6th Cir. 2012) (quoting *MetroPCS*, 400 F.3d at 723-24)); *accord ATC Realty, LLC v. Town of*

Kingston, 303 F.3d 91, 94 (1st Cir. 2002). In this case, for example, the Roswell City Code set forth nine criteria for determining whether to grant T-Mobile's application. J.A. 71-72. The City's Planning and Zoning Director found that T-Mobile's application satisfied all of those criteria. Pet. App. 4a. At the same time, the administrative record contains a good deal of material that is unrelated to any of these criteria. If a local government in this situation were not required to specify its reasons for denying a permit in a document separate from the administrative record, then a district court would have no way of knowing whether the locality denied the application based on an improper ground arising from this irrelevant record material.

Section 332(c)(7)(B)(iii)'s use of the word "decision" as the object of the "in writing" modifier reinforces Congress's expectation that permit denials must set forth the reasons for the local zoning authority's action. In legal parlance at the time the 1996 Act was drafted, the word "decision" commonly meant the same thing as "opinion" – namely, a written document providing "the reasons given for [a] judgment." Black's Law Dictionary 407 (6th ed. 1990).

To be sure, the word "decision" has "no fixed, legal meaning" and can mean something short of a statement of reasons explaining a determination. Black's Law Dictionary 407. But there can be no doubt in the context of the 1996 Act that the word "decision" implies something more than the statement of a bald conclusion with no reasoning whatsoever. Several other provisions of the Communications Act require agencies merely to "notify" parties of certain actions in writing. *See,*

e.g., 47 U.S.C. § 11 (requiring the FCC to "notify the parties concerned" after making determinations in certain common carrier cases); 47 U.S.C. § 398(b)(5) ("[T]he Secretary shall, within 10 days after such determination, notify the recipient in writing of such determination. . . ."). The fact that Section 332(c)(7)(B)(iii) uses the word "decision" implies more than a mere notice of conclusion. Rather, local zoning authorities must identify reasons for their actions.

3. Notwithstanding its "plain language" rhetoric, even the Eleventh Circuit was unwilling to hold unequivocally that a local authority that denies a permit application need not provide anything in writing explaining the reasons for the denial. Instead, the Eleventh Circuit tried to elide the issue, stating that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to," such as the minutes or a transcript of the hearing at which the application was considered. Pet. App. 13a (quoting *City of Milton*, 728 F.3d at 1285).

This will not do. The Eleventh Circuit's holding that the local government's "decision" need not contain any reasoning leaves only two possible interpretations of Section 332(c)(7)(B)(iii), neither of which withstands scrutiny.

First, the Eleventh Circuit could follow through on its reading of the words "in writing" in isolation and conclude – as the Fourth Circuit seemingly has – that a local zoning authority that denies a permit application need not provide anything at all in writing explaining the reasons for the denial. *See*

Winston-Salem, 172 F.3d at 312; *City of Va. Beach*, 155 F.3d at 429. Under this interpretation of Section 332(c)(7)(B)(iii), it would suffice for the local government simply to stamp the word "denied" on the permit application. *See Winston-Salem*, 172 F.3d at 312. No reasons for that action would need to exist in written form – whether in the administrative record or anywhere else.

The problems with such an interpretation are manifest. Most obviously, courts would be disabled from performing the judicial review that Section 332(c)(7)(B) mandates. As this Court has explained, "We must know what [an agency's] decision means before the duty becomes ours to say whether it is right or wrong." *Chenery II*, 332 U.S. at 197 (quoting *United States v. Chicago, Milwaukee, St. Paul & P. R.R. Co.*, 294 U.S. 499, 511 (1935)). Without any statement of reasons for an agency's action, a court cannot evaluate whether the action is valid.

The lack of any requirement to provide reasons for permit denials would also remove a critical check against arbitrary and capricious decision-making. "The necessity for justification is a powerful preventive of wrong decisions," Friendly, 123 U. Pa. L. Rev. at 1292, and "helps to insure that administrators . . . will act fairly." *Wolff v. McDonnell*, 418 U.S. at 565. This is because "reasoning forces the administrative decisionmakers to confront arguments against their position," 3 Charles H. Koch, Jr., Administrative Law and Practice § 10:40 (3d ed. 2010), and to crystallize and sharpen their analyses. Dispensing with these incentives would run exactly counter to Section 332(c)(7)(B)'s design.

Second, the Eleventh Circuit could construe Section 332(c)(7)(B)(iii) as requiring a statement of reasons but as being indifferent as to whether the reasons appear in the decision or merely in the administrative record. But such an interpretation cannot be squared with the language of the statute. Section 332(c)(7)(B)(iii) expressly differentiates a local government's written "decision" from the "written record." And the statute contemplates that the "written record" is where "evidence" should be housed. It follows that the "decision" must be where the local government must provide the reasons for its action.

B. Structure

Two other components of Section 332(c)(7)(B)'s system of judicial review buttress the conclusion that local governments must provide reasons for permit denials in writings separate from the administrative record.

1. Section 332(c)(7)(B) requires applications for permits to place, construct, or modify wireless service facilities to be resolved rapidly. For starters, the statute requires local governments to act on such applications "within a reasonable period of time after filing," 47 U.S.C. § 332(c)(7)(B)(ii) – presumptively 90 days to collocate a new antenna on an existing structure or 150 days to install a new structure. *See City of Arlington*, 133 S. Ct. 1863 (upholding FCC determinations in *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd. 13994, ¶ 4 (2009)). Moreover, Section 332(c)(7)(B) requires any lawsuits

challenging denials to be filed within 30 days of the local government's decision. 47 U.S.C. § 332(c)(7)(B)(v). And courts must resolve these lawsuits "on an expedited basis." *Id.*; *see also City of Rancho Palos Verdes*, 544 U.S. at 127-28 (Breyer, J., concurring) (noting centrality of these timing requirements to the congressional scheme).

The Eleventh Circuit's holding would thwart this requirement of expeditious judicial resolution. If local governments are not required to identify reasons for their actions in written documents separate from the administrative record, wireless carriers and other aggrieved parties would often have no reliable means to assess within 30 days whether they should file suit. There is no deadline for issuing a written administrative record. In this case, for instance, the City did not issue the minutes from the hearing at which T-Mobile's application was considered until 26 days *after* it sent the letter notifying T-Mobile that the application had been denied.[4] That left T-Mobile only four days to decide whether it should try to correct identified deficiencies in its application, enter into further negotiations with the City, or file suit. The next applicant may not even have that much time. Thus, the only sensible reading of Section 332(c)(7)(B)(iii), consistent with the overall statutory scheme, is one that affords wireless carriers the full 30-day allotment in the

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[4] *See http://roswell.legistar.com/MeetingDetail.aspx?ID=101786&GUID=63828B21-EB83-4485-B4EA-10EE65CF48CD&Search* (showing that minutes of April 12, 2010 hearing were adopted on May 10, 2010).

statute to carefully evaluate their options and whether to challenge a permit denial.

Even apart from this 30-day problem, Congress has directed courts themselves to resolve challenges to permit denials expeditiously. As a result, courts must be provided with clear statements of the reasons for the local governments' actions. If Section 332(c)(7)(B) lawsuits had to begin with an opening phase of litigation simply to determine the reasons for the local governments' actions, courts would be stymied in any attempts to expeditiously resolve the disputes.

2. Requiring local governments to provide reasons for their permit denials in documents apart from the administrative record is also critical to allow another part of Section 332(c)(7)(B)'s system of judicial review to function properly. As numerous federal courts of appeals – including the Eleventh Circuit – have recognized, substantial-evidence review under Section 332(c)(7)(B)(iii) is limited to the specific reasons identified by the local government. "A board may not provide the applicant with one reason for a denial and then, in court, seek to uphold its decision on different grounds." *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21 (1st Cir. 2002); *see also Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1220 n.9 (11th Cir. 2002) (a local government "may not rely on rationalizations constructed after the fact to support the denial of Appellee's application"); *Laurence Wolf Capital Mgmt. Trust v. City of Ferndale*, 61 F. App'x 204, 212 (6th Cir. 2003) ("[A]llowing retroactive cure of a deficiency thwarts Congress's intent.").

This rule

> follows not only from the requirement that the decision provide an adequate explanation to support judicial review, but also from the background understanding of the model of judicial review of administrative actions against which the Act was enacted. That model customarily prohibits a court from affirming an agency on grounds other than those the agency gave in its decision.

National Tower, 297 F.3d at 21 (internal citation omitted); *see also FEC v. Akins*, 524 U.S. 11, 25 (1998) (background rule); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 (same).

The only way to implement this rule against post hoc rationalizations is to require local zoning authorities to clearly articulate the reasons for their denials in the first place. Courts can then conduct their customary "substantial evidence" inquiry against those reasons – and only those reasons.

C. Purpose

"In determining the meaning of the statute, [courts should] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). That analysis further confirms the inadequacy of the City's bare-bones denial letter in this case.

1. The object and policy of the 1996 Act is "to promote competition" and to "encourage the rapid deployment of new telecommunications technologies" "in order to secure lower prices and higher quality services for American telecommunications

consumers." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996); *accord City of Rancho Palos Verdes*, 544 U.S. at 115 (2005); *see also* H.R. Rep. No. 104-458, at 113 (Conf. Rep.), 1996 U.S.C.C.A.N. at 124 (purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition"). Section 332(c)(7)(B) is designed to achieve that objective by preventing local governments from imposing undue "impediments [to] the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes*, 544 U.S. at 115.

Issuing a denial of a permit application with no reasoning whatsoever – and thereby making judicial review more arduous, if not downright impossible – is one such impediment. The longer it takes and the more procedurally burdensome it is for wireless carriers to process their applications for permits, the more costly and difficult it will be for such companies to meet consumer demand and compete effectively in the marketplace.

T-Mobile's predicament in this case vividly illustrates the point. T-Mobile is a competitive carrier, challenging larger, more established carriers in an effort to expand consumer choice and to lower prices. To take but one example of that strategy in practice, T-Mobile has recently invested in so-called "low band spectrum" – something that should enable T-Mobile to substantially improve its network and reach many currently underserved areas. The Federal Government has confirmed the desirability of

T-Mobile's low-band spectrum effort, explaining that, if successful, it could indeed "improve the competitive dynamic in the wireless market and benefit consumers." *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Letter from William J. Baer, Antitrust Division of the Department of Justice to Marlene H. Dortch, FCC, May 14, 2014, at 1.

But without necessary physical infrastructure, such as antennas and towers like the one at issue in this case, this effort will all be for naught. The only way for T-Mobile to deploy this infrastructure is to seek and obtain thousands of permits – one by one – from local zoning authorities. It thus is critical that if and when local authorities deny such applications, they specify their reasons for doing so. Otherwise, courts would be unable to expeditiously conduct substantial-evidence review, so as to allow competitive carriers to promptly smoke out unjustified denials and to allow legitimate deployment projects to go forward.[5]

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[5] In the fall of 2013, the FCC adopted a Notice of Proposed Rulemaking in which it seeks to "explore opportunities to promote the deployment of infrastructure that is necessary to provide the public with advanced wireless broadband services, consistent with governing law and the public interest." *2013 Wireless Broadband NPRM*, 28 FCC Rcd. 14238, ¶ 1. In the *2013 Wireless Broadband NPRM*, the Commission recognized that "[t]he ability of wireless providers to meet" the rapidly growing demand for wireless broadband services "will depend not only on access to spectrum, but also on the extent to which they can deploy new or improved wireless facilities or cell sites." *Id.* ¶ 2.

2. The Eleventh Circuit turned a blind eye to these concerns, choosing instead to favor what it perceived as the 1996 Act's "intent to preserve local authority over the location and construction of cell towers and other wireless facilities." *City of Milton*, 728 F.3d at 1283. Crediting this alleged goal of the 1996 Act, however, turns Section 332(c)(7)(B) on its head.

Section 332(c)(7)(B) is entitled "Limitations." As that title suggests, the entire purpose of the provision – including the provision at issue here – is to "*impose[] specific limitations* on the traditional authority of [S]tate and local governments to regulate the location, construction, and modification of [personal] wireless communications facilities." *Rancho Palos Verdes*, 544 U.S. at 115 (emphasis added). It would flout congressional intent to construe Section 332(c)(7)(B) in a crabbed manner so as to preserve local zoning authority.

Indeed, this Court itself has already rejected an argument extremely similar to the one the Eleventh Circuit credited here. In *City of Arlington*, the local government disputed the reasonableness of the FCC's order establishing presumptive timetables for processing applications for wireless facilities on the ground that the order supposedly impacted "matters of traditional state and local concern." 133 S. Ct. at 1873 (internal quotation marks and citation omitted). This Court retorted that "th[e] case ha[d] nothing to do with federalism" because "Section 332(c)(7)(B)(ii) explicitly supplants state authority." *City of Arlington*, 133 S. Ct. at 1873. This Court should similarly dismiss the Eleventh Circuit's "faux-federalism argument," *id.*, here.

D. Legislative History

Lest any doubts remain concerning the proper construction of Section 332(c)(7)(B)(iii), the Eleventh Circuit's holding also contravenes the 1996 Act's legislative history. The House's Conference Report on the legislation explains that "[t]he phrase 'substantial evidence contained in a written record'" in Section 332(c)(7)(B)(iii) "is the traditional standard used for judicial review of agency actions." H.R. Rep. No. 104-458 (Conf. Rep.) at 208, *reprinted in* 1996 U.S.C.C.A.N. at 222-23. Hence, far from envisioning a departure from ordinary administrative review principles, the drafters of Section 332(c)(7)(B)(iii) intended courts – at least to the extent not directed otherwise – to review local zoning authorities' decisions under the 1996 Act according to "traditional" rules. One such rule is the requirement that agencies specify the reasons for their decisions in writings separate from the administrative record. *See supra* at § I.A.

II. Allowing Denial Letters To Omit Any Specification Of Reasons Would Unduly Burden The Judiciary.

The Eleventh Circuit's holding that local governments are free to deny a permit for a personal wireless facility without issuing a separate written decision articulating the reasons for the denial would impose serious, unwarranted burdens on the judiciary. This case, in fact, perfectly illustrates the point.

1. This Court long ago observed that an agency's failure to identify reasons for its action "leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order."

Beaumont, Sour Lake & W. Ry. Co. v. United States, 282 U.S. 74, 86 (1930). "[S]tatements by the [agency] showing the grounds upon which its determinations rest are quite as necessary" to judicial review "as are opinions of lower courts setting forth the reasons on which they base their decisions." *Id.*

So too here. The Eleventh Circuit instructed that "[a]ll of the written documents should be considered collectively in deciding if the decision, whatever it must include, is in writing." Pet. App. 13a. But an administrative record in a case such as this may contain numerous sorts of documents: a transcript of the hearing at which the carrier's application was considered; minutes of the meeting; exhibits and studies introduced for and against the application; written recommendations prepared beforehand from subcommittees; letters and other submissions from community residents; and sometimes even news articles related to the application. What is more, several of these sorts of documents contain statements from numerous kinds of sources – statements from everyone from councilpersons themselves to paid experts to concerned local residents.

If courts truly had to wade through all of this material simply to make the threshold determination of what were the local authority's reasons – against which to conduct substantial-evidence review – it would become extremely difficult for courts to do their jobs. The judiciary would be forced into the role of a super-zoning board – required "to spell out, to argue, to choose between conflicting inferences" in administrative records, *Chicago, Milwaukee, St. Paul & P. R.R. Co.*, 294 U.S. at 510-11, trying to deduce why local governments denied permits. This is not

something courts are accustomed to doing or are well suited to perform. *See id.*[6]

For example, what if, as is sometimes the case, the minutes of a hearing that a local government adopts say one thing and the transcript turns out to say another? What if only local residents speak at a hearing and then the councilpersons just vote; should the residents' views be imputed to the councilpersons? What if an expert report appears in the record but no-one ever comments on it; does the expert's views count as the local government's? None of these quandaries admits to easy answers, and yet, under the Eleventh Circuit's approach, they would be sure to arise with regularity. Far better to require local governments themselves to identify their reasons for denying the permit in a simple document that short-circuits all of these problems.

2. This case exemplifies many of the difficulties that the Eleventh Circuit's rule would create. Witnesses spoke at the hearing and expressed a variety of divergent concerns. *See* J.A. 110-77. Later, five City Council members voted against T-Mobile's application. Yet to the extent they offered any reasons at all for opposing T-Mobile's application, they also expressed wildly disparate concerns:

- The first member asked some technical questions about T-Mobile's proposal but

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[6] Nor is it something that even local governments would likely embrace. When federal courts search through the record in order to surmise why local governments denied permit applications, they risk attributing to governments reasons that may not reflect the local government's intentions, desires, or policies.

"gave no reasons for opposing T-Mobile's application." Pet. App. 28a; *see* J.A. 121-22.

- The second member asked questions "about the height of the proposed tower" and about the possibility of using an alternative technology to achieve T-Mobile's objective. Pet. App. 28a-29a; J.A. 122. In later comments, he expressed concern about "the tower's '[in]compatability with the natural setting.'" Pet. App. 29a; J.A. 175-76.
- The third member asked T-Mobile representatives how it would provide continuous 911 service without a backup generator on site. Pet. App. 29a; J.A. 171-72. But when speaking later, she suggested that the tower was not "compatible with this area." Pet. App. 29a; J.A. 176.
- The fourth member did not ask any questions. In his comments before the vote, he asserted that "other carriers apparently have sufficient coverage in this area" and added that "[i]t's not our mandate to level the field" for T-Mobile. Pet. App. 29a; J.A. 173-74. This Council member also expressed his belief that "cell towers should *never* be allowed in residential areas." Pet. App. 29a (emphasis added); *see also* J.A. 174.
- The fifth member stated that she was opposed to T-Mobile's application because of "its aesthetic incompatibility with the neighborhood." Pet. App. 29a; *see also*

> J.A. 177. She also mused that "the adverse effects to the enjoyment of those neighbors and potential loss of resale value among other potential parameters are difficult really to definitively assess." Pet. App. 30a n.10; J.A. 177.

Following the fifth council member's prefatory remarks, she moved to deny the permit. Pet. App. 8a. Without any further discussion, her motion passed. J.A. 340.

About one month later, the City approved minutes of this hearing. These minutes "summarize the testimony of experts and concerned citizens, along with comments and questions from councilmembers." Pet. App. 15a; *see also* J.A. 321-41 (complete minutes). They also recount the concerns the final councilmember expressed before moving to deny T-Mobile's application. J.A. 339-40. Yet nothing in local law imputes concerns expressed before a motion to other voting members of the City Council. Nor does anything in the minutes specify any particular reasons for why the Council as a whole denied T-Mobile's application.

Finally, the letter the City sent T-Mobile to advise that it had denied T-Mobile's application does not point to anything in the administrative record where the reasons for the City's action might be found. Instead, the letter merely advised that the application had been denied at the hearing and that "[t]he minutes from the aforementioned hearing may be obtained from the city clerk." Pet. App. 15a.

After thoroughly analyzing this record, the district court found it "impossible . . . to discern" which of the various concerns expressed at the hearing or recounted in the minutes "motivated the

Council as a whole or commanded the support of a majority of the Council members." Pet. App. 30a. This impossibility posed a serious problem, because some of the reasons some council members gave at the hearing would have violated the 1996 Act. For instance, a denial based on a "blanket aesthetics objection – independent of any specific evidence relating to the cell tower's impact on the specific neighborhood and property values" would not be able to stand. Pet. App. 32a (citing *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 761 (11th Cir. 2005)). The same would be true with respect to a denial based on other carriers' coverage. *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd. 13994, ¶ 56 (2009) (citing cases).

Worse yet, some of the other potential reasons advanced by certain council members may have lacked substantial supporting evidence. *See* Pet. App. 31a. Yet "[a]bsent some explanation of the rationale for the City Council's denial of T-Mobile's application," the district court had no idea "what evidence [the City Council] found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id.* 32a.

It is equally telling that the Eleventh Circuit itself seemingly could not identify the City's reasons for the denial of T-Mobile's permit. The Eleventh Circuit spent four paragraphs describing the various components of the administrative record. Pet. App. 15a-16a. But it never told the district court which of the numerous concerns expressed in these documents

should count for purposes of substantial-evidence review. It is, therefore, anyone's guess how the Eleventh Circuit expected this case to proceed on remand. But whatever the Eleventh Circuit might have had in mind, there can be little doubt it would contravene Section 332(c)(7)(B)'s mandate of streamlined and expeditious judicial review – not to mention set the stage for frustration of that mandate in a more widespread way with respect to other permit applications for the placement, construction, and modification of personal wireless service facilities.

This Court should bring the Eleventh Circuit in line with the majority of other courts of appeals and require decisions denying permits to provide reasons for the denials. Only then will Section 332(c)(7)(B) serve its purpose of enabling efficient and expedited judicial review. And only then can the overall goal of the Act – facilitating the effective deployment of wireless infrastructure and services – be fulfilled.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

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July 3, 2014

STATUTORY APPENDIX

STATUTORY APPENDIX

Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c), provides in relevant part:

(7) Preservation of local zoning authority

(A) General authority – Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service

facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 13-975

SUPREME COURT, U.S.
FILED
AUG 18 2014
OFFICE OF THE CLERK

In The

Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

In order to promote the prompt deployment of telecommunications facilities and to enable expedited judicial review, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any decision by a state or local government denying a request to place, construct, or modify a personal wireless service facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

The question presented is whether a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory "in writing" requirement.

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BRIEF FOR RESPONDENT

It is clear that a document (letter) from a state or local government stating than an application has been denied that provides no reasons for the denial therein can satisfy the statutory "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii). Respondent City of Roswell therefore respectfully requests that the judgment of the United States Court of Appeals for the Eleventh Circuit be upheld and that the case be remanded back to the District Court for the Northern District of Georgia for determination of the substantive merits of the case.

STATEMENT OF CASE

A. Statutory and Factual Background

1. a. The Telecommunications Act of 1996 was enacted by Congress as a tool to help advance the breakup of long existing monopolies and promote competition and entry into the market for new providers of telecommunication and cable services. The legislation was not intended or envisioned as a means to transform or thwart the day to day operations of local government. This can be seen by looking at the Act as a whole. In the only section that addresses local government, Congress specified its intent to "preserve local zoning" autonomy. "Nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service

facilities." 47 U.S.C. § 332(c)(7)(B). The restrictions on local decision-making are therefore extremely limited in number and scope and are clearly set forth in the Act.

In *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113 (2005), this Court recognized § 332(c)(7) as a "scheme of expedited judicial review and limited remedies." With respect to Congressional intent, members of the Court noted:

> "[c]ontext here, for example, makes clear that Congress saw a national problem, namely, an "inconsistent and, at times, conflicting patchwork" of state and local siting requirements, which threatened "the deployment" of a national wireless communication system. H.R. Rep. No. 104-106, pt. 1, p. 94 (1995). Congress initially considered a single national solution, namely a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority. *Ibid.* see also H.R. Conf. Rep. No. 104-458, p. 207 (1996), U.S. Code Cong. & Admin. News 1996, pp. 124, 221. But Congress ultimately rejected the national approach and substituted a system based on *cooperative federalism*. *Id.* at 207-208. State and local authorities would remain free to make siting decisions. They would do so, however, subject to *minimum* federal standards – both substantive and procedural – as well as federal judicial review.

Id. at 127-128 (Breyer, J., concurring) (emphasis added).

The need for local governments to be able to protect their divergent local environs and aesthetics was expressly advocated. H.R. Conf. Rep. No. 104-458, pp. 207-08 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 222-23. "Conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50 foot tower in a residential district," H.R. Conf. Rep. No. 104-458, p. 208 (1996), likewise leaving flexibility for local governments to address aesthetic values without running afoul of the non-discrimination limitation.

To the extent that this case casts telecommunications providers against local government, this Court like the Solicitor General should not take one side over another as both are extremely important to the welfare of the people of the United States, as well as the overall economy. Like Congress, the Court should seek to minimize the impact on local government and its operations while advancing the needs of the telecommunications industry thereby advocating a compromise between the equally essential competing interests.

b. The City of Roswell, Georgia was founded in 1854. The daughter of one of Roswell's first families, Mittie Bulloch Roosevelt, was the mother of 26th President Theodore Roosevelt. Her granddaughter, Eleanor Roosevelt, would later marry President Franklin D. Roosevelt. http://www.roswellgov.com/index.aspx?NID+125. The City is one steeped in history, culture and beautiful natural surroundings. Situated

on the banks of the Chattahoochee River, Roswell strives to be the "premier riverside community connecting strong neighborhoods and the entrepreneurial spirit." The City's values promote "respect, flexibility, inclusion, communication, trust, courage, innovation, and excellence." http://www.roswellgov.com/index.aspx?nid=129. With a population of 88,346, an average household income now approaching $135,186 and average home values of $212,363, it is a progressive and active community in which telecommunications and current technologies are obviously an important aspect of the everyday lives of the residents. http://www.roswellgov.com/index.aspx?NID=933. The City thus "encourages" the development of wireless communications while concurrently attempting to "maintain the aesthetic integrity of the community," as envisioned by Congress. City of Roswell, Ga., Code of Ordinances § 21.2.1 (2008); J.A. 67.

In 2003, Roswell adopted "Standards for Wireless Communications Facilities," to establish guidelines for the siting of all wireless communications towers and antennae. Section 21.2.4(a) therein provides the specific factors to be considered by the City and Council in determining whether to issue a permit for a wireless facility. These reasons include: "(1) Proximity to residential structures and residential district boundaries; (2) The proposed height of the tower; (3) Nature of uses on adjacent properties; (4) Surrounding topography, tree coverage and foliage; (5) Design of the facility, with particular reference to design characteristics which have the effect of reducing or

eliminating visual obtrusiveness; (6) Proposed ingress and egress; (7) Availability of suitable existing towers, other structures, or alternative technologies (micro cells) not requiring the use of towers or structures; (8) Demonstrated need for the telecommunications facility at the specified site; and (9) Utilization of the City of Roswell Master Siting Plan, as amended." Roswell actually has a plan with approved sites for towers, some of which are not yet utilized. J.A. 67.

2. Of the estimated 283,385 cell sites quoted by T-Mobile and Amici, there are 32 cell tower sites in the 42 square miles of the City of Roswell. J.A. 133. Seventeen of those sites were already being used by T-Mobile at the time of its Application in 2010. Based on these numbers alone, it is nonsensical to aver that the City desires to or has slowed the advancement and placement of wireless communication sites in its jurisdiction. The City balances the needs of its constituents for service against the aesthetics of its community. It is a difficult task to accomplish. The City takes into account that there are newer technologies that can and do strike a true balance between these competing needs by preserving the local aesthetics, some of which are becoming the norm in the industry, like microcells or Distributed Antenna Systems.

"[G]rowth in new site deployment is likely to accelerate as providers increasingly deploy small cells and Distributed Antenna Systems ("DAS") that expand capacity or coverage in a local area through small, low-mounted antennas [like telephone poles]." It is these newer technologies not requiring the larger

traditional towers, particularly in residential areas, that Roswell promotes. Roswell Ordinance § 21.2.4(a). J.A. 67. "These new technologies supplement the capacity of the 'macrocell' network [honeycomb cell tower grid], filling in gaps or providing additional capacity in localized outdoor or indoor areas where adding a traditional macrocell would be impractical or inefficient." *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Notice of Proposed Rulemaking*, 28 FCC Rcd. 14238, ¶ 2 (2013).

It has been recognized that the top 5 wireless providers have all standardized on 4G LTE as their wireless communication standard, which has now been deployed in most major population centers. While still using it, this new standard is less dependent on the "macrocell" honeycomb cell tower system that was vital to 2G phones and their predecessors. In a 2014 update on its own technological advances that will provide "Network Innovation at Internet Speed," T-Mobile stated:

> [W]e began rolling out our LTE in early 2013. Today, just over a year later, we deliver America's fastest nationwide 4G LTE network, covering 233 million Americans in 325 metro areas. Then, just over two months ago, our network guru, Neville Ray, announced T-Mobile Voice over LTE (VoLTE) in the Seattle area – making T-Mobile the first in the nation to launch VoLTE. In the same breath, Neville promised VoLTE nationwide by the end of 2014 – while continuing to build out

> our T-Mobile Wideband LTE. . . . As of today, T-Mobile offers nationwide VoLTE. That's nationwide. . . . The team has also been aggressively rolling out Wideband LTE, **upgrading our remaining 2G footprint to 4G LTE** and starting to roll out our new low-band 700 MHz A-Block spectrum. In fact, in the three months since we got hold of this spectrum, we've already begun equipping sites with 700 MHz gear. Just. Three. Months. And we've begun field-testing our first 700 MHz-compatible devices, so we can get those devices in stores and online – and in customers' hands – before the end of this year. **As we roll out this low-band spectrum, expect to see big improvements in in-building 4G LTE coverage – as well as coverage out beyond major metro areas.** And we've got at least 10+10MHz 4G LTE in an amazing 43 of the top 50 markets. Plus, our T-Mobile Wideband LTE, which we define as at least 15+15MHz, is already in 17 metro areas – with 26 total metro areas planned for the end of this year. . . . No one else is capable of lighting up new network technologies like this team. **We can do this, because we're not playing the phone company utility game. We're playing the mobile *Internet company game.***

http://newsroom.t-mobile.com/news/firing-on-all-cylinders.htm (emphasis added).

T-Mobile no longer even provides the 2G coverage on which the Application in Roswell was based. In the

immediate future, its phones will rely primarily on internet connectivity and the ability to switch seamlessly between internet and lower band wireless that requires less from its traditional honeycomb network, thereby stretching the reach and capacity of the existing equipment. Bottom line, it is newer and better technology allowing Voice over Internet, and many other upgrades in both its network and its phones that could ultimately make cell towers a thing of the past. As for T-Mobile's current 4G LTE coverage for the Lake Charles Drive neighborhood in Roswell, Georgia, the coverage map indicates T-Mobile has "good" coverage and that residents can "[g]et clear calls plus surf the web, tweet, post to Facebook . . . you've got all the 4G LTE coverage you need to stay connected." http://www.t-mobile.com/coverage.html.

This is exactly why in introducing the 1996 Telecommunications Act, Congressman Pressler stated that "it was anticipated that it would be succeeded with the ushering in of the wireless age by another act, maybe in 10 or 15 years." 142 Cong. Rec. S686-03. That time has come. It is a different era with diverse and rapidly expanding options using a new and different set of rules to govern the contest between carriers. It is and will become telecommunications on a global level, not unlike the first steps of the internet revolution. It is not a stretch to imagine that the need for large cellular towers could become obsolete within the next few decades as international standards and internet technologies are applied. Now more than ever, it is paramount that local governments

exercise their planning and zoning judgment in the siting of additional mega-structure towers that will remain as permanent fixtures in their communities.

3. On February 2, 2010, T-Mobile filed an Application with the City of Roswell desiring to place an 11 story (108 foot) cellular tower in the middle of the City's oldest lakeside residential neighborhood to "improve existing [2G] service."[1] Pet. App. 3a-4a. The Application was for a new tower located at 1060 Lake Charles Drive. *Id.* The proposed site is surrounded on all sides by residential homes, including lakeside properties. *Id.*; *see also*, J.A. 64-65. The tower would stand 25 feet taller than any existing tree on the proposed residential site. *Id.*

At the time of this Application, T-Mobile subscribers primarily had 2G phones and it was estimated that there were only 700 customers in the entire City of Roswell. J.A. 97, 138. Nonetheless, T-Mobile had towers and good coverage in the City, including the specific area at issue. The company desired to make the coverage better in accordance with its own definitions of what "better" meant and

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[1] The Application was reviewed by the Roswell Zoning Department and it recommended approval of the application *with the condition* that the cell tower site be moved 120 feet east of the west property line, placing the onus of any visual impact on the leasing property owner receiving the financial gain. Pet. App. 4a. While the proposed T-Mobile site was in a clearing on the proposed property, the Zoning Department required moving the tower to a wooded area completely surrounded by trees. *Id.* T-Mobile refused to accept this condition. *Id.*

without any standards for what could be deemed acceptable coverage in the industry as a whole. The crux of its stated need was to improve indoor coverage for its subscribers and provide for anticipated growth. It demanded the improvement in this exclusive residential area without revealing if there was a problem with existing coverage or complaints regarding its service. When confronted with these crucial inquiries regarding its need, T-Mobile told the constituents of Roswell that:

> The information requested [the number of customers and actual complaints regarding service in the area] . . . is proprietary. T-Mobile has a responsibility as a business to provide the best service possible to our customers; any other business providing any kind of service or product has the same responsibility. If ONE customer demanded improved service, if ONE customer will receive the benefit of improved service, T-Mobile has a right to request this permit . . . in order to provide improved service. . . .
>
> One dropped call or one complaint is too much. We have determined that there is a need to improve service in this area to a level deemed acceptable by our engineers charged with monitoring the network. As a company, we are certainly entitled to determine the service levels we deem acceptable.

J.A. 96, 104-105.

It is no wonder that Roswell's residents came forward at the April 12, 2010 hearing on the Application prepared with local experts who were attorneys [explaining what the community must show to meet the current "substantial evidence" test employed by recent Georgia district court decisions], real estate agents [to speak to the impact of towers on real estate value], telecommunication industry workers and IT specialists [to speak to all of the available less-invasive technologies, questioning T-Mobile's need for a tower], and current T-Mobile customers [to address the excellent coverage existing in the area]. After the presentation by both sides and comments by almost all council members voting, a specific motion was made by Council Member Price to deny the Application.

> As liaison to the department, it is my, I won't say distinct honor, but my responsibility to make some sort of motion . . .
>
> I think based on our ordinance, Article 21.2.1, . . . the purpose and intent of our cell phone ordinance to protect the residential areas from the adverse impact of telecommunications towers and to minimize the number of towers and the other adverse impacts being minimized. I think the conclusion from that first section would be that this is aesthetically incompatible and certainly in this area. It's other than I-1, C-3, offices or highway commercial area [zoning districts].
>
> Number two, the alternative tower that was proposed, in my opinion, it would not be

> compatible with the natural setting and surrounding structures also due to the height being greater than the other trees.
>
> And, number three, in our Ordinance Article 21.2.4, the proximity to residential structures, the nearness to other homes, and being within the residential zoning area and adjacent properties, therefore, the adverse effects to the enjoyment of those neighbors and potential loss of resale value, among other potential parameters are difficult really to definitively assess.
>
> Therefore, overall, I move to deny the application for the wireless facility mono-pine tower on Lake Charles Drive.

Pet. App. 8a; J.A. 176-177. This motion was seconded by two Council members and then unanimously approved. Pet. App. 15a. The City Council unanimously voted to deny the Application.

As part of the usual course of business, two days after the vote the City Zoning Administrator sent a letter to T-Mobile stating that the City had denied the Application and that "minutes from the aforementioned hearing may be obtained from the city clerk." J.A. 278. T-Mobile did not seek to obtain the minutes. Nonetheless, per the letter *the minutes were available*. However, just like with every other local government in Georgia, those minutes were not formally adopted and approved by Council until the next full meeting on May 10, 2010. Petitioner's Brief, p. 9.

T-Mobile filed suit on May 13, 2010. J.A. 34. One can surmise that T-Mobile did not need the minutes to determine whether to file suit because: 1) providers as a rule of thumb file suit when they are denied a site; 2) it was represented at the hearing, heard the presentation of the community and the comments, motion and vote of Council firsthand; 3) it had its own verbatim transcript of the proceedings on which to make its decision regarding appeal; and 4) it never approached the City with questions concerning the denial.

B. Procedural History

1. The Complaint.

On May 10, 2010, T-Mobile filed an action in the United States District Court for the Northern District of Georgia alleging that the City's denial was not supported by substantial evidence in the record, would have the effect of prohibiting the provision of wireless service in violation of the Act and that the denial had the effect of unreasonably discriminating among providers of functionally equivalent services.[2]

---

[2] There was no contention in T-Mobile's Complaint that the City failed to meet the "in writing" requirement of the Act. Although it noted in its Statement of Facts that the City issued a letter denying the Application and "[t]he letter gave no reasons for the denial," there is no allegation that this violated the Act in any way. Likewise there is no mention of the "in writing" requirement in any of the alleged theories of recovery, including the theory that there was not substantial evidence in the record to support the denial. J.A. 56-58.

In connection with these claims, T-Mobile also sought an injunction to compel the City to grant the requested permit for the tower. There was no allegation that the City did not timely process and hear the Application.

Following a lengthy discovery period that was expanded by T-Mobile, both parties moved for summary judgment. At that time, T-Mobile dropped its unreasonable discrimination claim. The City had desired to bifurcate the case into two parts, first dealing with the "substantial evidence in the record" test and then the other expert based allegations, allowing for immediate motions that would have included the issue at bar and would have resulted in no delay in obtaining a decision on the merits of the substantial evidence claim.

2. The Erroneous Decision of the District Court.

On March 27, 2012, the district court granted T-Mobile's motion for summary judgment finding that the City did not meet the "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii). In so finding, the court had before it a letter in writing stating that T-Mobile's Application had been denied and that minutes of the meeting *were* available. The written record contained the City's Ordinance that set forth the factors considered by the Council, comprehensive minutes of the Council meeting which included a specific motion setting forth detailed reasons pursuant to the

City Ordinance to deny the Application with a unanimous vote thereon, and a verbatim transcript of the hearing. The court held that because the City did not provide a separate written denial that set forth the specific reasons the Application was denied it had violated § 332(c)(7)(B)(iii). The court stated that to meet the "in writing" requirement, a written decision "must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." Pet. App. 27a-28a.

The court went further, finding that while "[t]he minutes and transcript of the hearing reflect questions and comments by individual Council members . . . nowhere is there a clear articulation of the rationale of the Council as a whole for denying the application." *Id.* at 28a. No reason "was cited by a majority of the council members as a basis for their vote to deny the application." *Id.* The court specified that it was "left to review the voluminous record without any guidance as to what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id.* at 32a. As a result, the court concluded that it was unable to assess whether the City's decision was supported by substantial evidence in the record. *Id.* at 33a. Elevating form over substance and based solely on this defect in the writing, the district court issued

an injunction directing the City to grant T-Mobile's Application for the cellular tower. *Id.* at 34a.

3. The Decision of the Eleventh Circuit.

Relying on its rationale in *T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274 (11th Cir. 2013), the Eleventh Circuit reversed the district court and held that the City of Roswell met the "in writing" requirement. Pet. App. 16a. In *City of Milton*, the circuit court adhered to its long standing precedent in statutory interpretation of refusing to add to or alter the plain language of the Act, and ruled that the straightforward language of § 332(c)(7)(B)(iii) that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record," plainly requires that the decision to deny be "in" a "written document." 728 F.3d at 1283. In that case, as in Roswell's case, the writing was a simple letter to T-Mobile stating that the Application had been denied, providing no reasons for the denial. *Id.* at 1279.

The *City of Milton* decision went further in its analysis of the entirety of the statutory language, stating there "must be reasons for the denial that can be gleaned from the denial itself or from the written record; otherwise, there would be nothing for substantial evidence to support. What is neither expressed nor implied, however, is any requirement

that the reasons for a denial must be stated in the letter or some other document that announces the decision, if there is a separate document doing that, or any prohibition against having the reasons stated only in the hearing transcript or minutes." *Id.* at 1283. As *dicta*, the court stated that "to the extent that a decision must contain grounds or reasons or explanations as required by other district courts, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." *Id.* at 1285.

In reviewing the record, the circuit court in *T-Mobile South, LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1219 (11th Cir. 2013), determined not only that the City met the "in writing" requirement, but that there were adequate reasons for the denial in the minutes of the meeting and the transcript that allowed the trial court to conduct a meaningful "substantial evidence" review under § 332(c)(7)(B)(iii). Pet. App. 17a-18a. The Eleventh Circuit properly reversed and remanded the case to the district court. *Id.* at 18a.

SUMMARY OF THE ARGUMENT

In 1996, Congress amended the Communications Act of 1934. The Telecommunications Act of 1996 was the first comprehensive overhaul of national telecommunications policy in over sixty years. The intent of the 1996 Act was to promote competition and, most important to Petitioners and Amici, provide rapid

deployment of new telecommunications. Despite the asserted local government interference to this deployment, Congress saw fit and specifically determined that there were legitimate state and local concerns involved in regulating the siting of wireless service facilities such that it could not be mandated on a federal level.

47 U.S.C. § 332(c)(7) is an attempt to harmonize local autonomy in land use regulation with the needs of the telecommunications industry. In doing so, the Act clearly respects and preserves state and local authority over land use. This attempt at *cooperative federalism* comes at the expense of *limited* intrusion on how local governments operate. *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 127-128 (Breyer, J., concurring). "The statute's balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations, and it imposes an unusual burden on the courts. But Congress conceived that this course would produce individual solutions best adapted to the needs and desires of particular communities. If this experiment in 'cooperative federalism' does not work, Congress can always alter the law."[3] Indeed, with the newer technologies that were not even foreseeable in 1996 and a new global outlook and standard, the time is ripe for such a revision.

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[3] Eagle, Steven J., *Wireless Telecommunications, Infrastructure Security, and the Nimby Problem*, 54 Cath. U. L. Rev. 445 (2005).

Given today's technology, unfettered access to more and more cell towers is not the answer to meeting the needs of tomorrow's generations. It would be a critical error to advance the swelling need for cellular communication and turn a blind eye to the simultaneous explosion in technologies available for meeting the ever increasing demand. This is particularly true when newer technologies will not necessitate the enormous towers that generate the negative response of constituents that local governments must typically address. That is why, until amended by Congress, the current statute must be read strictly when it comes to intrusion on State and local government and its processes.

A. Petitioner and Amici would have this Court take a small provision of the Act designated to preserve and protect local zoning authority and expand it to require local governments to jump through more and more technical and procedural hoops to meet the specified limitations of the statute. Taking the exact words of the statutory text in their natural and obvious sense and not unreasonably restricting or enlarging them reveals that: ([A]ny decision) by a state or local government [modifies 'any decision' – a decision by whom] denying a request to place, construct, or modify a personal wireless service facility [modifies 'any decision' by defining what the decision is – it is a denial] shall be in writing and supported by substantial evidence contained in a written record. Thus, a denial must be in writing and supported

by substantial evidence in the record; nothing more, nothing less.

The text, structure, history and purpose of § 332(c)(7)(B)(iii) demonstrate that a letter from a state or local government stating than an application has been denied that provides no reason for the denial whatsoever satisfies what has come to be known as the statutory "in writing" requirement. The Solicitor General, on behalf of the FCC who administers the Act, has filed a brief agreeing that the statute "neither explicitly nor implicitly" requires that reasons be provided in a written denial. SG Brief at 24.

B. "Substantial evidence" is a standard of review telling the Court and local government what must be in the written record as evidence to support the denial. It defines a quantum of evidence. It does not define a writing. Even if Congress knowingly or unknowingly engrafted a need for "reasons" by electing a substantial evidence review, this must still be read within the set boundaries of preserving the local government zoning process. The fairest interpretation, taking nothing away and adding only reasons to facilitate review, would mean as the Solicitor General found:

> Although Congress's provision for substantial evidence review imposes a corollary requirement that the local government give reasons for denying an application to construct a cell tower, the statute neither explicitly nor implicitly requires that those reasons be provided in the written denial

> itself. Consistent with the savings clause, 47 U.S.C. § 332(c)(7)(A), permitting the statement of reasons to be incorporated from the written record minimizes the intrusion on the normal processes of local government. . . . The 1996 Act should not be read to disturb that process, so long as the minutes or another document in the record clearly sets forth the reasons for the denial.

SG Brief at 24-25.

Regardless of their adoption or rejection of the three-part standard for "in writing" found in *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002), expanded upon by the district court and Petitioner, the majority of circuit courts now agree that the "reasons" can be in minutes of the meeting or a resolution in those minutes, or in minutes and other documents in the written record. In other words, just as the Solicitor General has pronounced, there does not have to be a separate denial letter containing reasons. The reasons can be in writing in the minutes or another document in the record. This does not strain the interpretation of the statute and add requirements restricting the way local governments operate.

In the instant case, the circuit court found that the reasons were contained in the minutes. *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606 (6th Cir. 2004), supports that decision. In *Omnipoint*, the reasons were contained in a resolution (the same as the motion in this case) made by a Council member with a unanimous vote to deny. According to

the dissenting opinion, this resolution was in the minutes. Though not as articulate, the motion of Councilmember Price is akin to that in *Omnipoint*, addressing the Ordinance governing the decision and reasons for denial from that Ordinance with a following unanimous vote. *Omnipoint* also involved the necessity of the adoption and approval of the minutes of the meeting (and thus the resolution or vote) in the following council meeting. Likewise, the Solicitor General confirmed that the reasons were evident from the minutes, contained in the statements of the voting council members. SG Brief at 31.

The very foundation of Petitioner's rationale for its tortured and expanded definition of "in writing" is predicated on the inability of courts to perform a substantial evidence review without all of this detailed information (posited as "reasons") in a separate written denial. Yet, in every other circuit court case, whether or not the "in writing" requirement was met, there was a determination on the merits as to whether there was substantial evidence in the record to support the denial. Excepting *City of Milton*, this is the first time in a circuit court telecommunications case that the underlying district court said that it could not decipher the reasons for the local government's denial and did not perform or attempt to perform a substantial evidence review based on the written record. It is no wonder that Petitioner chose this as its model to test its "in writing" definition.

No other court needed the reasons set forth with the specificity requested by the district court to

perform a merits review. Moreover, it has been shown that the district court erred in finding that reasons could not be determined from the record. The Solicitor General was able to readily discern that a majority of the Council stated that aesthetic incompatibility with the surrounding area was the basis for the denial. SG Brief, p. 31. This highlights not only the glaring error of the district court, but the fallacy of any need for detailed reasons for substantive judicial review.

In simplest terms, Petitioner advocates that because Congress provided that a denial must "be supported by substantial evidence in a written record," this provision must be read with "denial in writing" to mean that: (1) a denial must be in a writing that is separate from the written record; (2) the denial must set forth the majority consensus of the local council members' specific "reasons" for that denial; and (3) the denial must contain sufficient explanation of the reasons to allow a reviewing court to evaluate the evidence in the record that supports those reasons, including what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why. Obviously such language is not in the statutory language itself nor was it grafted into the statutory language by implication.

Examining each component of Petitioner's definition of "in writing," it has already been addressed that there is no statutory basis or need for a separate written denial with reasons. Reasons, to the extent necessary, may be in the minutes or in the written record. Likewise, there is no need for a majority

consensus on the reasons. The APA does not require federal agencies to be unanimous in the reasons for their decisions. Indeed, *Omnipoint* would suggest that consensus could be implied by concurrence (voting yes) to a specific motion with subsequent adoption and approval of the minutes containing same.

C. Finally, and most importantly, making reasons part of the "in writing" requirement necessitates a slippery slope concerning exactly what will constitute reasons sufficient to allow judicial review. To avoid litigation on this slope, local governments will be forced to issue the equivalent of "findings of fact and conclusions of law," thereby putting the burden of the APA on a local lay governing body. Requiring reasons to contain "what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether and why" is an outright demand for "findings of fact and conclusions of law."

Placing Administrative Procedure Act burdens and constraints on State and local governments in the rendering of their decisions would necessitate a Tenth Amendment challenge and review. Further, as there is no basis for issuing an injunction and mandating a permit without violation of a substantive or time limitation in the Act, such an injunction likewise incites the need for Tenth Amendment evaluation. No circuit court case has allowed an injunction without a substantial evidence merits review.

The simplest way to avoid imposing these onerous federal standards on State and local governments and facing constitutional challenge to the statutory system that governs an important component of our national commerce, is to follow the plain wording of the statute and answer the question presented with a simple "yes." Or, in the alternative, to answer the question as posed by the Solicitor General with a simple "yes." Either way, the imposition of reasons sufficient to allow Petitioner's definition of "meaningful" judicial review is avoided and courts can continue to do what they have always done – look to the written record guided by the legal briefs before them.

Not making a local government issue a denial in writing with sufficient reasons to allow meaningful judicial review (ultimately requiring findings of fact and conclusions of law) does not affect the substantive rights and protection provided by the Act to telecommunication carriers. Regardless of "the writing," carriers whose petitions are denied at the local level are still entitled to substantive review of the merits of any decision and enforcement of the protections provided to them by Congress. Indeed, the telecommunications industry has nothing to lose in this alleged conflict, but it undoubtedly has everything to gain. If this Court adopts Petitioner's position and decides that the Eleventh Circuit was wrong, it is the local governments who would be harmed, as they would be forced to allow cellular towers in the heart of their residential communities based upon a mere technicality, without regard for the

merits of their decisions. Seeking to obtain this advantage for itself and the industry, Petitioner brings these issues to this Court and asks for an interpretation that is clearly not mandated by the language.

ARGUMENT

A. Statutory Construction

The text, structure, history and purpose of 47 U.S.C. § 332(c)(7)(B)(iii) demonstrate that a decision denying an application need only be in writing. This writing does not need to identify the reasons for the denial. Thus, a letter from a state or local government stating than an application has been denied that provides no reason for the denial therein satisfies the statutory "in writing" requirement.

1. The text of § 332(c)(7)(B)(iii) provides that the decision to deny a request be in writing.

The text in dispute specifies that "any decision by a state or local government denying a request to place, construct, or modify a personal wireless service facility shall be in writing and supported by substantial evidence contained in a written record." This language is clear and unambiguous. A simple diagram of the sentence as one would do in a high school English class reveals the plain meaning. ([A]ny decision) by a state or local government [modifies 'any decision' – a decision by whom] denying a request to

place, construct, or modify a personal wireless service facility [modifies 'any decision' by *defining* what the decision is – it is a denial] shall be in writing ***and*** supported by substantial evidence contained in a written record. Thus, a "decision to deny" must be "in writing" and "supported by substantial evidence contained in a written record."

Petitioner espouses tortuous interpretations of this language in an attempt to overcome the very basic wording of the statute. First it seeks to redefine "decision" beyond its simplistic meaning, going so far as to compare "decision" with "notify." Secondly, it argues that "decision" must mean more than a "bald" denial despite the fact that the statute contains no such language.

Seizing on the fact that the definitions of "decision," like most words in the English language, are numerous and multi-faceted, Petitioner latches upon the more elaborate interpretations that best suit its needs. In *Merriam-Webster's Collegiate Dictionary,* 11th Ed. (2003), the very first definition of decision is: "a determination arrived at after consideration: conclusion." *Black's Law Dictionary*, 6th Ed. (1990), clarifies that a decision is a "determination . . . A popular rather than technical or legal word; a comprehensive term having no fixed legal meaning. . . . 'Decision' is not necessarily synonymous with 'opinion.' A decision of the court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the judge." Synonyms include: "choice, result, conclusion, verdict, pronouncement, judgment,

resolution, outcome, decree," all of which lead naturally to the meaning provided in the text itself. A "decision" in this context is a "denial." For a local government, the decision is clearly the result of the vote – a "yes" or "no" (denial) on the matter before it. Had Congress intended "decision" to mean anything more, such as to include reasons for the decision, it would have so specified or it could have used a term such as "opinion."[4] No definition equates "decision" to "notify."

Petitioner also seeks to read "decision . . . in writing" and "supported by substantial evidence contained in a written record" as one, but then ironically must separate the two to reach the ultimate interpretation it desires. Petitioner and Amici paradoxically argue that because "supported by substantial evidence" means that there must necessarily be reasons for judicial review under that judicial standard, those reasons must be in the written denial. They argue that the language must be read together and joined

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[4] Congress plainly and specifically required certain content for other kinds of writings issued under the Act. *See, e.g.*, 47 U.S.C. § 252(e)(1) ("written findings as to any deficiencies" are required in connection with certain types of agreements); § 271(d)(3) (FCC is required to "state the basis for its approval or denial" of specific kinds of applications). *See also,* 47 U.S.C. § 204(a)(1) (Congress required the FCC to provide a carrier a "statement in writing of its reasons" for suspending charges); § 213(f) (Congress required that "reasons" be provided for denying access to certain records). Had Congress wanted more in the writing mandated by § 332(c)(7)(B)(iii) it would have specified the specific content it envisioned.

so that "in writing" and "reasons" are made into one requirement. Then, they separate the two again by contending that "in writing" must be separate from the "written record" because of the conjunctive. This distortion makes no sense given the plain language of the statute.

Indeed, both the structure of the language and the use of the conjunction "and" provide for separate and distinct requirements. This rightfully puts "reasons" with the "written record" as both relate to the "substantial evidence review." The text itself and a rational reading of it make clear that the City's letter stating the application had been denied met the "in writing" portion of the Congressional limitation.

To reach this conclusion, this Court need not take a strict constructionist approach that is scorned by Petitioner and Amici. From the beginning, this Court has instructed that "[t]he words of any legal text . . . are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged." *Martin v. Hunters*, 14 U.S. 304, 326 (1816). The Court has also relied on grammatical structure and has held that the use of "and" means the phrase that precedes "stands independent of the language that follows." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). In this case, it means that a local government must meet both – two different directives.

In *Ron Pair*, the Court stated that "the task of resolving the dispute over the meaning [of the

statute] begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms. The language before us expresses Congress' intent . . . with such sufficient precision so that reference to the legislative history and to pre-Code practice is hardly necessary." *Id.* (citations omitted). *See also, Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 475 (1992) (In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished); *Carter v. United States*, 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by examining the text, not by psychoanalyzing those who enacted it."). The same rules apply here. The grammar, the intent of Congress expressed in the text itself, along with the use of the conjunction, clearly provide the logical interpretation of the natural language and require neither adding nor taking anything away from the wording of the statute. As in *Ron Pair*, this is where the inquiry should end.

Further substantiating this obvious conclusion, the Solicitor General on behalf of the FCC who administers the Act, has filed a brief agreeing that a letter from a state or local government stating that an application has been denied but providing no reason for the denial therein can satisfy the statutory

"in writing" requirement. "Although Congress's provision for substantial evidence review imposes a corollary requirement that the local government give reasons for denying an application to construct a cell tower, the statute neither explicitly nor implicitly requires that those reasons be provided in the written denial itself." SG Brief at 24.

2. The broad structure of the Telecommunications Act confirms that § 332(c)(7)(B)(iii) was not intended to impose additional burdens on local governments.

While there is no question that the intent of the Telecommunications Act as a whole is to promote competition and rapid deployment of new telecommunications, Congress saw fit and specifically determined that there were legitimate state and local concerns involved in regulating the siting of wireless service facilities such that it could not be mandated on a federal level. 47 U.S.C. § 332(c) reads:

> *(7) Preservation of local zoning authority*
>
> (A) General authority
>
> Except as provided in this paragraph, *nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction*

> *and modification of personal wireless service facilities.*

(Emphasis supplied).

This Court has already recognized that the context for this particular provision was "a system based on *cooperative federalism*. State and local authorities would remain free to make siting decisions . . . subject to *minimum* federal standards." *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 127-128 (2005) (Breyer, J., concurring) (emphasis added).

The stated intent to preserve local zoning authority reveals that the overall aim of the Act was not one of rigid interpretation that would impact the local government zoning process. The Solicitor General and FCC recognize in their brief that the intent of Congress was to "*minimize* the intrusion on the normal processes of local governments, which are often composed of laypeople who are not accustomed to writing opinions setting forth the reasons for their actions. As reflected in decisions addressing this issue, local zoning boards or city councils often operate by discussing an issue during a hearing, and then providing "minutes" or a written summary of what transpired at the meeting, which are reviewed and may be amended by the board. The Act should not be read to disturb that process. . . ." SG Brief, pp. 24-25. The Act does not impose an "inflexible requirement" that a denial letter include reasons, indeed "[a] strict requirement that the state or local government include a statement of reasons in a 'decision to deny' that is separate

from the written record would . . . serve little purpose." *Id. See, Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001) (Although requiring reasons in the denial, the court acknowledged that a meaningful review of the decision is not limited to the written decision. "[S]uch a requirement would place an unjustified premium on the ability of a lay board to write a decision.").

3. The underlying purpose and the legislative history of § 332(c)(7)(B)(iii) both underscore that its provisions were meant to be narrow and not an imposition by Congress of inflexible requirements on local governments.

Land use decisions have historically been the province of local government. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). In fact, land use regulation is "the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 (1982). In the Act, Congress in its wisdom sought to protect this long standing domain of local authorities in the statute.

The Act initially proposed lodging all tower siting decisions with the FCC and eliminating local zoning control. *Omnipoint Corp. v. Zoning Hearing Board*, 181 F.3d 403, 407 (3d Cir. 1999). Upon reflection, "Congress . . . acknowledged that there are legitimate State and local concerns involved in regulating the siting of such facilities. . . . Localities should have the flexibility to address such things as **aesthetic values** and the costs associated with the use and

maintenance of public right of ways." *Id.* So Congress stripped the Act of its provisions placing tower siting decisions with the FCC and restored local zoning control. Section 332(c)(7) was added to "preserve the authority of State and local governments over zoning and land use matters except in *limited* circumstances." H.R. Conf. Rep. No. 104-458, pp. 207-08 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 222-23 (emphasis added). Congress was clear and the Act honors the local government decision-making processes, subject only to the limited circumstances stated. Local decisions must be timely, in writing, supported by substantial evidence in a written record, and not have the effect of prohibiting the provision of wireless service or of unreasonably discriminating among providers of functionally equivalent services. That's it. No more restraints can be imposed on the local government zoning process or read into the Act.

4. The circuit court correctly found that the statutory language requires that a denial of a permit simply be "in writing."

Given the plain wording of § 332(c)(7)(B)(iii), along with the structure, history and purpose of this section of the Act, answering the Question Presented of "whether a document (letter) from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory 'in writing' requirement," is a simple and straightforward yes. The

circuit court thus properly adhered to its long standing precedent of statutory interpretation, refusing to add to or alter the plain language of the Act, and ruled that the language of § 332(c)(7)(B)(iii) requires only that the decision to deny be in writing. "The words of the statute we are interpreting require that the decision on a cell tower construction permit application be 'in writing,' not that the decision be 'in a separate writing' or in a 'writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held' or 'in a single writing that itself contains all of the grounds or reasons or explanations'" for the decision. *T-Mobile, LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1219 (11th Cir. 2013), quoting *T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274, 1285 (11th Cir. 2013). There is no reason to overturn this decision and many more reasons that the circuit court's decision, in particular remanding the matter back to the district court, should be upheld.

B. The Position Advanced By Petitioner Needlessly Re-writes the Statute and Necessarily Strains the Question Before This Court.

If as Petitioner argues, by adopting the substantial evidence standard, Congress did either wittingly or unwittingly incorporate a need for "reasons" for a local government's denial, new questions arise that were not before the circuit court. Indeed, this whole train of thought and the arguments advanced

regarding same by Petitioner and Amici stray further and further afield from the Question Presented.

Petitioner asserts that "[w]here Congress borrows terms of art in which are accumulated the legal tradition and meaning . . . , it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1953) (where it was held that "intent" or a "culpable mind" was necessarily a part of a crime). Because Congress used the words "supported by substantial evidence," it is argued that courts cannot perform a substantial evidence review without the reasons for the decisions. Petitioners and Amici cite to *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), as support for this rationale. Obviously, *Chenery* deals with administrative agency decisions and not local government zoning.

"Substantial evidence" is a defined quantum of evidence. It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). Whether Congress intended to import federal standards of review into local government practice and what impact that would necessarily have was not the question before the circuit court nor is it the precise question presented by certiorari herein. Of necessity, this prompted the Solicitor General to rephrase the question presented to be:

> Whether, when denying an application for a permit to construct a new cell tower, the relevant state or local government must provide a clear statement of reasons for the denial, and, if so, whether those reasons must be set forth in the written "decision . . . to deny [the] request," 47 U.S.C. § 332(c)(7)(B)(iii), or whether they may instead appear elsewhere in the written record that supports that decision.

Although the circuit court does not directly address this question, it appears to concur that the substantial evidence requirement "necessarily means that there must be reasons for the denial that can be gleaned from . . . the written record." *T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274, 1283 (11th Cir. 2013). It can readily be inferred from both the *City of Milton* and *City of Roswell* opinions that these reasons need not be in a separate writing that is distinct from the written record. In answering the rephrased question to address both issues raised by Petitioner, the Solicitor General concurs that the "reasons" need only appear in the written record that supports the decision.

> Although Congress's provision for substantial evidence review imposes a corollary requirement that the local government give reasons for denying an application to construct a cell tower, the statute neither explicitly nor implicitly requires that those reasons be provided in the written denial itself. Consistent with the savings clause, 47 U.S.C.

> § 332(c)(7)(A), permitting the statement of reasons to be incorporated from the written record minimizes the intrusion on the normal processes of local government. . . . The 1996 Act should not be read to disturb that process, so long as the minutes or another document in the record clearly sets forth the reasons for the denial.

SG Brief, pp. 24-25.

1. The correct interpretation of "in writing" and "substantial evidence" as separate and distinct requirements is actually supported by the statutory construction demanded by Petitioner and its Amici.

Answering the question posed by the Solicitor General, which is only part and parcel of the entire extrapolation demanded by Petitioner, does not require a strict or strangled interpretation of the language of the statute before the Court. Instead, the "holistic" and "fairest" interpretation is allowed for and accomplished. "The interpretive objective is to identify the *fairest* reading of the text – not the narrowest one." Chamber of Commerce Brief, p. 15. The fairest interpretation would not require the Court to find that decision means a separate statement of reasons when Congress a) defined decision in the statute; b) purposely used a conjunctive between the requirements; and c) specifically intended to limit the intrusion on local government regarding these

decisions. It also fulfills the objective that "[t]he words of any legal text, in sum, are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter*, 14 U.S. 304, 326 (1816). "To subtract words from the law is no more appropriate than to add them. The judicial task is neither to delete nor to distort." *62 Cases, More or Less, Each Containing Six Jars of Jam v. U.S.*, 340 U.S. 593, 596 (1951).

These interpretative arguments as espoused by Petitioner and Amici lead naturally to the conclusion advocated by Respondent, the Solicitor General and the FCC. This Court need neither add nor subtract from the language to find that "in writing" does not necessitate a separate writing with reasons. Reasons may be necessary for judicial review, but as long as they can be gleaned from the record to allow for that examination by the courts the words and supposed Congressional intent are both satisfied.

2. The majority of the circuit courts now accept that the writing and the reasons can actually be a part of the written record.

Even while reading the "in writing" and "substantial evidence" requirements together, the majority of the circuit courts now allow the writing with the reasons to be a part of the written record and do not require a separate denial with reasons. In *Omnipoint Holdings, Inc. v. City of Southfield*, 355

F.3d 601, 606 (6th Cir. 2004), the circuit court stated "*we reject the concept that a resolution in meeting minutes will never meet the separate writing requirement, if it otherwise allows meaningful judicial review.*"[5] (Emphasis added). *See also, U.S. Cellular v. Board of Adjustment*, 180 Fed. Appx. 791, 798-801 (10th Cir. 2006) (Board meeting minutes and letters not condensed into a formal denial document were deemed sufficient to meet the "in writing" requirement); *Helcher v. Dearborn County*, 595 F.3d 710, 721 (7th Cir. 2010) (minutes of the meeting satisfied the "in writing" requirement where the minutes delineated the issues that arose with the application); *AT&T Wireless, PCS, Inc. v. City Council of City of Va. Beach*, 155 F.3d 423 (4th Cir. 1998) ("The City Council's decision was reflected 'in writing' both in the condensed minutes of the March 25 meeting and in the letter from the Planning Commission describing the application, with the word 'DENIED' and the date of decision affixed."); *T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274, 1283 (11th Cir. 2013) ("to the extent that a decision must contain grounds or reasons or explanations as required by other district courts, it is sufficient if those are contained in a

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[5] Reading *Omnipoint* carefully, the resolution was actually a motion made at the hearing which recited reasons from the City Ordinance to deny the request. There was a unanimous vote. This resolution or motion was the "majority consensus" and satisfied the "in writing" requirement. While the opinion differentiates the resolution from the record, the dissent makes clear that this resolution was actually in the "meeting minutes."

different written document or documents that the applicant is given or has access to").

This majority rationale comports with the determination of the Solicitor General and the FCC that the reasons can be in the written record and need not be in a separate written denial. In the instant case, they found that the minutes of the meeting contained the reasons and were sufficient for a substantial evidence review. SG Brief, p. 31.

3. District and circuit courts have routinely sifted through the record and conducted "substantial evidence" review without the need for a separate written statement of reasons for a denial.

Aside from the T-Mobile cases in the Eleventh Circuit, in every single circuit decision cited by Petitioners and Amici, including those where the court specifically found that the "in writing" requirement was not met because there was not a statement of the reasons for the decision in a separate denial letter that was not a part of the written record, the courts *all* moved forward to conduct a substantial evidence review of the record. *See, e.g.*, *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001) ("we conclude that the record contains substantial evidentiary support for the Board's denial of the permit application"); *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002) ("we conclude that the Board's denial of New Par's variance request was not

supported by substantial evidence contained in a written record"); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 726 (9th Cir. 2005) ("we affirm the district court's ruling that the Board's decision was supported by 'substantial evidence' as required by the TCA").

The fact that this did not occur in this case and its companion *City of Milton* makes these decisions completely novel. That must be the reason Petitioner and Amici chose this case to challenge the "in writing" requirement. It is the first time in a circuit court telecommunications case that the underlying district court said that it could not decipher the reasons for the local government's denial and did not perform or attempt to perform a substantial evidence review based on the written record before it. The finding that reasons could not be determined from the record in *City of Roswell* (Pet. App. 30a) is shown to be incorrect by the Solicitor General's ability to readily discern that a majority of the Council stated that aesthetic incompatibility with the surrounding area was the basis for the denial. SG Brief, pp. 30-31. This highlights not only the glaring error by the district court, but also the frailty of Petitioner's position which is predicated on the alleged inability of courts to decipher the "reasons" without a separate written denial stating them for the court. Based on these errors, the case should be remanded back to the court for a review on the merits, as directed in the Eleventh Circuit opinion.

4. The stated need for a majority rationale or consensus on the reasons is not part of the question presented and would conflict with the need to limit intrusion on the operation of local government.

Petitioner and Amici further decree that the reasons needed must be the consensus of the majority of the council. They argue that because it is much too difficult to determine the "majority rationale" from the written record alone, a separate written denial with reasons is necessary. As a corollary, they contend that without this consensus it is impossible for the court to conduct a "substantial evidence" review. Already flawed in logic given the ability of all other courts to perform the review based on the written record, the additional problems generated by this inflexible stance taken by the district court, Respondent and Amici presupposes two erroneous theories. One, that there must be a majority "consensus" for such a review; and two, that a motion on which the majority votes and agrees cannot be equated to a majority "consensus" by virtue of a unanimous vote.

As pointed out by the Solicitor General and the circuit court, incorporating the standard of "substantial evidence review" mandates reasons. Unlike Petitioner and Amici, the Solicitor General and FCC, along with the majority of the other circuit courts, agree that these reasons can be in the written record. However, a need for "reasons" does not equal a "majority rationale" specifically stating those reasons or

that such a consensus is necessary to meet the substantial evidence review standard. "If each member of a council majority gives a different reason for voting to deny an application, but each reason is permissible and supported by substantial evidence in the record, that combination of rationales would likely be a proper basis for upholding the local government's decision." SG Brief, n. 6, pp. 31-32.

To support this reasoning, the Solicitor General cites to cases wherein panels in administrative agencies did not have a "majority rationale," for the decision. *See, e.g., United States Steel Grp. v. United States*, 96 F.3d 1352, 1361 (Fed. Cir. 1996) (concluding that commissioners of the International Trade Commission were permitted to engage in different reasoning to reach the same conclusion); *NLRB v. American Can Co.*, 658 F.2d 746, 753 (10th Cir. 1981) (stating that "there is no decision which holds that the lack of a majority rationale renders the Board's orders unenforceable"). It necessarily follows that if administrative agencies are not required to have a "majority rationale" it would be illogical and problematic to impose such a requirement on a local governing board of lay people who are not judges or experts in their fields. Congress could never have intended and this Court should not impose standards for local governments that specialized agencies are not even required to meet.

Taking that a step further and incorporating the way local governments work, it could also mean that when a motion is made with reasons and a majority

affirms same, it is adopting the reasons in said motion – when there is no evidence to the contrary. Indeed, lacking a need for a majority consensus, it is a reasonable interpretation of such a vote and the simplest, most efficient and logical way for a local government to provide reasons. Otherwise, each council member would be forced to offer the equivalent of concurring opinions found in appellate courts. The facts of *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606 (6th Cir. 2004), certainly support this reasoning.

Thus, even if incorporating a necessity of reasons with substantial evidence review, Congress was still expressly preserving the authority and zoning processes of local governments. Congress could not have intended the imposition of a "majority rationale," or even worse exacted reasons from each and every legislator to confirm same or support a review. In Petitioner's leading case, *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001), the court "**stress[ed]** that a meaningful review of the decision is not limited . . . only to the facts specifically offered in the written decision. [As] such a requirement would place an unjustified premium on the ability of a lay board to write a decision." *Todd* recognized that at the end of the day, the district court must sift carefully through the record to determine if there are additional facts supporting the denial by the local government, taking away from the espoused critical importance of the majority consensus and rationale for the decisions.

In addition, in *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), quoted repeatedly by Petitioner and Amici, this Court found that "had the Commission . . . promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different. [The] SEC had not promulgated general standards of conduct in this situation. . . . [C]ourts cannot exercise their duty of review unless they are advised of the **considerations** underlying the action under review. The process of review requires that the **grounds upon which the administrative agency acted** be clearly disclosed and adequately sustained. . . . We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." Nowhere does this language mandate a "majority consensus" and it further supports the idea that a simple Ordinance specifying what the council must consider in determining its action on a cell tower application could meet the *Chenery* requirement and allow for substantial evidence review.

The bottom line is that if the district court can glean reasons for the denial from the statements of the council members or a motion with reasons such as the one made by Councilmember Price in this case, or even a city ordinance that sets forth the factors (reasons) to be considered by the Council, the district

court should be able and routinely does perform a review of the record (regardless of its size)[6] to determine whether there is substantial evidence to support a denial. Given that the reasons could be found in the record, the circuit court was correct in reversing the district court and remanding the case for a review on the merits.

C. Requiring Reasons for a Denial Outside of the Written Record Will Place Local Governments in the Untenable Position of Having to Issue Findings of Fact and Conclusions of Law.

If this Court holds that the "in writing" requirement can only be satisfied by a separate written denial that sets forth the reasons for denial with sufficient clarity to enable meaningful judicial review as demanded by Petitioner, it will force local governments to the same playing field as administrative agencies

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[6] Petitioner's arguments regarding the size of the record are merely a red herring. The size of the record herein (750 pages) is substantially less than many records courts must deal with on a daily basis. Furthermore, the district court herein shows that the fastest and easiest route (and indeed probably the only one performed by the lower court) is to look to the transcript of the hearing which will no doubt include the evidence presented, statements of council members if any, and any specific motion setting forth reasons and the actual vote. In this case the transcript was 108 pages. A quick perusal of the pages preceding the actual vote to find reasons would not unnecessarily burden the judiciary or delay decisions on the merits. A review of the minutes (10 pages) would be even shorter.

and necessitate that they issue the equivalent of findings of fact and conclusions of law to support a denial of a permit. No other circuit court has been willing to even entertain such a finding.

> The requirement of formal findings of fact and conclusions of law has no basis in the language of the Act. Section 332(c)(7)(B)(iii) merely requires a written decision, in contrast to the Administrative Procedures Act and other sections of the TCA that explicitly require formal findings of fact and conclusions of law. *See City Council of Virginia Beach*, 155 F.3d at 429-30 (citing statutes). Furthermore, strong policy reasons counsel against reading congressional silence on this matter as permission to impose such a requirement. Passage of the TCA did not alter the reality that the local boards that administer the zoning laws are primarily staffed by laypeople. Though their decisions are now subject to review under the TCA, it is not realistic to expect highly detailed findings of fact and conclusions of law. In the absence of an express congressional directive, therefore, we find no basis for inflating "[t]he simple requirement of a 'decision . . . in writing' . . . into a requirement of a 'statement of . . . findings and *60 conclusions, and the reasons or basis thereof.'" *Id.* at 430.

Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 60 (1st Cir. 2001). *See also, Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (The Fifth Circuit, in a different zoning context, cautioned

that requiring a local zoning authority to provide judicial type findings from the record evidence shifts the function of a member of a zoning board from that of a legislator deciding the best course for the community to that of a judge adjudicating the rights of contending petitioners); *Helcher v. Dearborn County*, 595 F.3d 710 (7th Cir. 2010) (Local zoning boards typically are not populated with lawyers, much less judges, so that courts cannot expect something akin to a judicial opinion); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005) (Requiring findings of fact and conclusions of law would place an unduly heavy burden on lay zoning boards).

By adopting a requirement that the writing be "sufficient to permit meaningful judicial review," the question then becomes "How much is enough?" How is a group of 5 or 6 lay people on a council supposed to know how much and what magic language should be used? This again strains the question presented and adds new questions that have not been posed. It opens the door to a myriad of different interpretations that place the focus on the writing and not the evidence in the written record.

1. A "fair construction" would necessitate a compromise between the need for expedited review and the way local government operates.

Requiring reasons in writing in a separate denial letter sufficient to allow meaningful judicial review

again re-writes and adds to the statutory language. Worse, it changes how local lay governments do business day in and day out and seeks to make them into federal administrative bodies akin to the SEC or NLRB. As T-Mobile argues herein, and as all carriers will henceforth argue, the reasons stated will never be enough to provide for meaningful judicial review. In the instant case, the district court stated that to provide for meaningful judicial review it needed to know "what evidence the City Council [meaning each and every individual member] found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id.* at 32a. Petitioner advances this position as reasonable and necessary. If local governments are required to provide reasons at this level, findings of fact and conclusions of law are mandated. No local government comprised of elected lay people can possibly meet that level of procedural and substantive scrutiny. Even the courts imposing these standards eschew making local government go that far beyond the pale of its everyday workings.

As already shown, if the Court takes the "fair construction" of the statute and re-words the question presented as that of the Solicitor General, a written denial need not contain reasons, if reasons are contained in the written record. Thus, in accordance with the Solicitor General's argument the letter stating the application was denied and giving no reasons but directing T-Mobile to the minutes in the record that contained reasons would meet all of the requirements under 47 U.S.C. § 332(c)(7)(B)(iii).

2. The position advocated by Petitioner raises more questions than can be answered by the question presented, including consideration of the constraints of the Tenth Amendment.

Once the Solicitor General answers its own version of the question presented, it continues on to espouse that a letter of denial must be issued contemporaneously with the minutes that contain the reasons. He then takes an erroneous leap to find that because that did not occur the circuit court's order must be overturned, all the while conceding that all elements of the statute had been met with respect to a denial in writing and sufficient reasons in the record. To reach this conclusion, the Court must make a new inquiry and engraft more language and reasoning arising from the interplay between § 332(c)(7)(B) and § 332(c)(7)(B)(iii) as to the timing of appeals. The new question must incorporate: When does the timing for the thirty-day appeal of a denial begin?

If the denial letter referred to the minutes and the minutes are not final and approved until the next meeting of Council, the thirty days could and should start to run with the "final" act of the local government with respect to its denial of the application – the adoption of the minutes. *See Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606 (6th Cir. 2004) (Thirty-day time period did not begin to run until the minutes were approved at the next board

meeting.). *See also, City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 127 (2005) (Breyer, J., concurring) ("Those adversely affected by 'final action' of a state or local government may obtain judicial review provided they file their review action within 30 days."). In this case the minutes contained the reasons and the final action was thus the adoption and approval of those minutes.

This necessitates no delay if that time, as here, was still within the 150 days set by the FCC for determination of new siting requests. That predetermined "shot clock" protects against unreasonable delay in finalizing the record. In this case, the City's minutes were approved on day 99 of that 150-day window. There was no delay. The City had a denial in writing and reasons for the denial in the written record, per the findings of the circuit court, the Solicitor General and FCC, well within the allotted time. Given same, the timing of appeal cannot and should not be the dispositive issue.

This reading once again gives deference based on the way local government operates and is a reasonable and fair construction of the statute and its constraints on local government. A denial of a new tower within 99 days cannot be touted as arbitrary or even an attempt at delay to stop deployment or timely judicial review. Clearly the City should not be penalized for trying to meet the letter of the statute with a denial in writing and the separate provision of timely reasons in minutes in the written record. This in no way hampers judicial review and the carrier is

accommodated as its appeal clock does not begin until the minutes are approved and final.

In sum, requiring written reasons will lead to the imposition of findings of fact and conclusions of law for each and every telecommunications decision that requires substantive evidence. Local government is not designed to function this way. The administrative nightmare it would create is neither authorized nor necessary to determine the merits of this case and the question presented. As is shown, the position of Petitioner and Amici create more questions than they answer. The slippery slope of those questions directed at additional requirements from the APA that could and would be imposed at the local level as litigation on this issue continues and leads inevitably to the erosion of boundaries between federal and local government. This scenario becomes too dangerous to even countenance. The simple solution, given that the City has met the stated mandates of § 332(c)(7)(B)(iii), is affirming the circuit court decision and remanding same. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), would merely require remand to provide the reasons. In *Chenery*, this Court held that "the cause should therefore be remanded to the Court of Appeals with directions to remand to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate." *Id.* To do otherwise would impose federal standards that would openly invite Tenth Amendment scrutiny.

> Imposition of any federal standard on a state or local body's legislative process, even if

"relatively modest" as the district court characterized it, has at least two substantial, detrimental effects on federalism. First, the very act of imposition, without a meaningful opportunity for a state to opt out, compromises state and local sovereignty. And second, regardless of the relative effects of the federal and local standard, the imposition of a federal standard on a local board confuses the electorate as to which governmental unit, federal or local, is to be accountable for a legislative decision made by the local board. These two effects alone threaten fundamental constitutional values. They undermine the structure which assures the division of power and thereby preserves our fundamental liberties, and they compromise the effective exercise of democratic power, that power which is reserved to the people. . . . When a congressional enactment compromises "the structural framework of dual sovereignty," the compromise, regardless of its degree, results in a fundamental defect, and "no comparative assessment of the various interests can overcome [it]." Consequently, the command that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" is categorical. . . . When a local legislative body acts under a standard imposed by the federal government, even if the federal standard is comparable in effect to state standards, a significant risk arises that the citizens of the community will not know whether the legislative act is the product of Congress or of

> their local legislature. This confusion inevitably frustrates a normal democratic response.

Petersburg Cellular Partnership v. Board of Supervisors, 205 F.3d 688, 700 (4th Cir. 2000).

This Court has already recognized that 47 U.S.C. § 332(c)(7)(B) is an attempt by Congress at "cooperative federalism" and that the statute requires that state and local governments operate under limited federal substantive and procedural standards. *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 127-128 (2005) (Breyer, J., concurring). Mandating more and more federal procedural requirements as requested by Petitioner, will make this constitutional decision inevitable. There is no need to open the Act to this query when based on the question presented the answer is a clear "yes."

3. No circuit court has allowed the issuance of an injunction based solely on a failure to comply with the "in writing" requirement because doing so would be a clear violation of the Tenth Amendment.

Irrespective of all other arguments herein, Petitioners are not entitled to the right to an immediate injunction without consideration of the substantive limitations imposed by 47 U.S.C. § 332(c)(7)(B)(iii). There is no authority upon which an injunction can

be issued for failing to meet the procedural "in writing" requirement. In every circuit court case in which an injunction has issued under this Section it has been as the result of the failure to have substantial evidence in the record to support the denial. Granting an injunction requiring a local government to issue a permit without reaching the merits would assuredly run afoul of the Tenth Amendment.

Granting an injunction when the district court erred and espoused the necessity of "findings of fact and conclusions of law" in accord with the APA would cross the line and demand Tenth Amendment scrutiny. A fair and constitutional interpretation would not require an injunction issue solely on the basis of failure to meet the "in writing" requirement or even to correctly time a denial letter with the minutes that contain the reasons. As long as decisions are not delayed, telecommunications are not hampered. Balancing these interests weighs in favor of local government as they are the only ones that have anything to lose in this dispute.

CONCLUSION

For the reasons set forth herein, Respondent City of Roswell respectfully requests that this Court affirm the holding of the circuit court remanding the case to the district court for findings on the merits.

Respectfully submitted,

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REPLY BRIEF

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AND
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Supreme Court of the United States

T-MOBILE SOUTH LLC

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

Starting from the dubious premise that Congress enacted the 1996 Act in order to maintain the status quo ante – preserving full local authority over decisions related to siting wireless communications facilities – the City suggests that local governments have no obligation to provide written reasons when denying applications to construct such facilities, and that even if they do have such an obligation, it is sufficient if those reasons can be gleaned from the record.

This argument fails to come to grips with the meaning or purpose of the Telecommunications Act of 1996. As petitioner has explained, this Court has held, and the Solicitor General confirms, Section 332(c)(7)(B)(iii) of the Act is expressly designed to require local governments to adhere to certain non-negotiable requirements when considering applications to construct or modify wireless communications facilities. Chief among those actions is the requirement that local governments provide contemporaneous reasons for denying any such application. And there is nothing particularly onerous about this requirement. Local governments already must provide reasons for denying various sorts of applications, and – as the Solicitor General stresses – they can "easily" do so in this context too. U.S. Br. 34.

The Solicitor General, of course, does not completely agree with petitioner. He also contends that, while the City's failure to provide timely reasons for its denial mandates reversal here, such reasons need not invariably "be provided in the written denial itself." U.S. Br. 24, 34. This contention, however, cannot be squared with the

statutory directive that local governments issue written "decision[s]" – a directive in the context of Section 332(c)(7)(B)(iii) that connotes a document not only with the word "denied" but also with an explanation of *why* the application was denied. The Solicitor General's proposal also would generate an operational nightmare. Federal courts would regularly have to scour administrative records to surmise for themselves why local governments might have denied applications for wireless facilities, thwarting the efficiency and predictability that Section 332(c)(7)(B)(iii) is designed to ensure. Accordingly, this Court should not only reverse the Eleventh Circuit's holding, but it should make clear that local governments' written decisions denying wireless facility applications must explicitly state the reasons for denial.

I. Local Governments Must Provide Written Reasons For Denying Applications At The Same Time They Issue Such Denials.

The Solicitor General agrees with petitioner that the Eleventh Circuit's decision should be reversed because (1) local governments must provide written reasons for denying applications to place, construct, or modify personal wireless service facilities and (2) such reasons must be provided at least "at substantially the same time as the decision denying the request," U.S. Br. 26-27. The City, however, is noncommittal on the first of these propositions – allowing only that "[r]easons *may* be necessary," Resp. Br. 39 (emphasis added); *accord id.* at 23, 44 – and disputes the second. Both propositions are correct.

1. To the extent the City argues that a decision denying the type of application at issue here satisfies Section 332(c)(7)(B)(iii) *regardless of whether reasons for the denial can be gleaned from the administrative record*, the City is plainly incorrect. As petitioner and the Solicitor General have explained, Section 332(c)(7)(B)(iii)'s requirement that denials be supported by "substantial evidence" necessarily imposes an obligation on local governments to provide reasons for such denials. Petr. Br. 17-34; U.S. Br. 18-23.

The City never expressly disagrees with this contention, instead merely noting that the term "substantial evidence" denotes "a defined quantum of evidence." Resp. Br. 36. Certainly that is one thing the term does. But the term – in conjunction with the statute's "in writing" directive – also imposes the corollary requirement that a local government provide written reasons for its action. "[C]ourts cannot exercise their duty of review" for substantial evidence "unless they are advised of the considerations underlying the action under review." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see also* Petr. Br. 18-21; U.S. Br. 19-22.

2. Seemingly recognizing as much, the City retreats to arguing that the meeting minutes in this case – issued twenty-six days after it denied petitioner's application – satisfied the statutory requirement to provide written reasons. This is so, the City contends, because documents released after issuing a written denial and anytime "within the 150 days set by the FCC for determination of new siting

requests" can provide the statutorily required reasons. Resp. Br. 51-52.[1]

The City's argument ignores the text of Section 332(c)(7)(B) and would create serious administrative difficulties. As to text, the requirement that local governments provide reasons for denying applications to construct wireless facilities arises from subsection (iii)'s "in writing" requirement, not from FCC regulations implementing the "reasonable time" requirement for issuance of denials. *See* U.S. Br. 27. Accordingly, the reasons must be issued at the same time as "decisions" denying such applications, 47 U.S.C. § 332(c)(7)(B)(iii), not weeks or months later.

To be sure, wireless companies need to know reasons for denials in part "to give [them] information to determine whether judicial review is warranted." U.S. Br. 27. And companies have thirty days from "*final action* . . . by a State or local

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[1] The City also asserts (Resp. Br. 12) that T-Mobile did not seek to obtain the minutes before their adoption and that the minutes were available before they were approved. Neither of these assertions is true. On the same day the City sent the denial letter, Lannie Greene, T-Mobile's Site Acquisition Specialist, requested a copy of the minutes from the City's Clerk. The Clerk supplied him with a copy of the draft "brief minutes," which were essentially a copy of the April 12, 2010 agenda with a notation of the outcome and the vote. As the Solicitor General recognizes, the "brief minutes" were not replaced with the complete, detailed minutes until May 10, 2010. U.S. Br. 11-12; *see also* http://roswell.legistar.com/MeetingDetail.aspx?ID=98007&GUID=67841775-E4E0-4B78-BB60-CF4EE6701AD0&Options=info|&Search (brief minutes adopted Apr. 19, 2010).

government" to file such lawsuits. 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added). But the "final action" of an administrative agency occurs when the agency issues a document "mark[ing] the 'consummation' of the agency's decisionmaking process" and defining legal "'rights or obligations.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). Accordingly, a local government's "final action" in this context is obviously its written decision denying the application, J.A. 278, not the later publication of meeting minutes or any other part of the administrative record.[2]

Any other rule would decouple "decisions" from the statutory limitations period for challenging them, creating intolerable uncertainties for applicants. Upon receiving written denials, wireless companies would never know whether the thirty-day window for seeking judicial review would begin then, or perhaps at some later, unspecified date. Worse yet, Section 332(c)(7)(B)(iii) would no longer track state law. The Georgia Supreme Court has held that when a zoning board issues a written decision, that decision is its "final act" for purposes of triggering the limitations period for bringing state-law challenges to such

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[2] The City suggests that the Sixth Circuit held to the contrary in *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601 (6th Cir. 2004), asserting that the 30-day limitations period there "did not begin to run until the minutes were approved." Resp. Br. 51. But the City misrepresents the holding in that case. The 30-day limitations period commenced there "when the [local government's] *resolution* became final," and the resolution was the local government's *decision* – "a writing separate from [the minutes and the rest of] the hearing record." *Omnipoint*, 355 F.3d at 606 (emphasis added).

agency action. *Chambers v. City of Atlanta Bd. Zoning Adjustment*, 340 S.E.2d 922, 923 (Ga. 1986). Other state-court decisions are in accord. *See, e.g.*, *City of Bethany v. Hill*, 509 P.2d 1364, 1365 (Okla. 1973) ("The minutes of the Board patently are not the written ruling of the Board."). Diverging from such state-law rules with respect to seeking review under the Telecommunications Act would needlessly complicate procedures for seeking judicial review of administrative action.

II. Reasons Local Governments Provide For Denying Applications Must Appear In The "Decisions" Disposing Of The Applications.

While the Solicitor General suggests that local governments "would be well advised" to provide reasons for denials in their decisions, the Solicitor General contends that such reasons need not necessarily be provided in the decisions themselves. U.S. Br. 34. It is sufficient, the Solicitor General argues, if "the minutes or another document in the record" issued contemporaneously with the decision "clearly sets forth the reasons for the denial." *Id.* at 25. The City advocates an even more lenient approach, maintaining that local governments comply with Section 332(c)(7)(B)(iii)'s "in writing" requirement "as long as [reasons for the denial] can be gleaned from the record." Resp. Br. 39.

Neither of these proposals withstands scrutiny. The text, purpose, and functionality of Section 332(c)(7)(B)(iii) all dictate that the reasons for a denial must appear in the written denial itself.

A. The Text Of Section 332(c)(7)(B)(iii) Requires Reasons To Be Provided In Decisions Themselves.

When a local government denies an application to build or modify a wireless facility, Section 332(c)(7)(B)(iii) requires it to provide not only a written "record" but also a written "decision." As the City itself acknowledges, these are two "separate and distinct requirements." Resp. Br. 29. And as petitioner has explained – and the Chamber of Commerce has elaborated – the word "decision" indicates that the reasons for the denial must be included in the written denial itself. Petr. Br. 27; *see also* Chamber of Commerce Br. 7-18. Other provisions of the Communications Act reinforce the point: The Act typically uses words such as "notify" when it envisions nothing more than advising someone of an outcome, while other sections use the term "decision" when contemplating statements of reasons. Petr. Br. 24-25; Chamber of Commerce Br. 9-13.

The Solicitor General offers no answer to this textual argument. That silence is telling.

The City offers a response. But its response is equally telling. According to the City, the statute should be "amended by Congress." Resp. Br. 19. Suffice it to say this Court decides cases based on the language Congress actually enacted, not amendments that parties might like to have proposed or adopted in the future.

B. The Purpose Of Section 332(c)(7)(B)(iii) Demands That Reasons Be Stated In Decisions Themselves.

The City next expends considerable energy arguing that requiring it to provide reasons for denials in the denials themselves would run afoul of Section 332(c)(7)(B)'s purpose. "The stated intent" of the statute, the City contends, is "to preserve local zoning authority" and "protect this long standing domain of local authorities." Resp. Br. 32-33. Thus, the City continues, local governments must remain free to decide for themselves what type of process is manageable and appropriate for dealing with applications to construct or modify personal wireless facilities. And given that city councils and other types of land-use boards are often comprised of laypersons working part-time, the City maintains that it would be simply too burdensome for them to provide reasons in denial letters.

Each of these assertions is demonstrably incorrect.

1. The title of Section 332(c)(7)(B) is "Limitations." 47 U.S.C. § 332(c)(7)(B). In other words, the stated intent of the statute is precisely the opposite of what the City contends. The statute does not preserve local authority but rather "*impose[s] specific limitations* on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (emphasis added). Put another way, giving local governments, such as the City, carte blanche to engage in business-as-usual with respect to

applications to construct wireless facilities would flout the very purpose of Section 332(c)(7).

To be sure, the overall structure of the Telecommunications Act of 1996 incorporates certain elements of "cooperative federalism." *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring). The Act, for example, makes local governments the initial venue for evaluating wireless facilities applications and allows them – subject to the statute's constraints, *see* Petr. Br. 4 & n.1; *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 799 (6th Cir. 2012) – to craft their own substantive criteria for considering those applications. But at least when it comes to core process requirements, Section 332(c)(7)(B) "explicitly supplants state authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013). Accordingly, the specific statutory directive at issue here, just like other procedural directives in Section 332(c)(7)(B)(iii), "has nothing to do with federalism." *Id.*; *see also* PCIA Br. 24-25.

What is more, this statutory directive – which one commentator has characterized as effectuating "process preemption," Ashira P. Ostrow, *Process Preemption in Federal Siting Regimes*, 48 Harv. J. on Legis. 289 (2011) – is the backbone of the Act. Congress adopted Section 332(c)(7)(B) to "reduce 'the impediments imposed by local governments upon the installation of facilities for wireless communications.'" U.S. Br. 4-5 (quoting legislative history). By requiring local governments to provide written reasons when denying applications to construct wireless facilities and subjecting those reasons to expedited judicial review, Congress expected that courts would be able quickly to smoke out unlawful denials. Yet, as the Solicitor General

acknowledges, "it may sometimes be difficult to discern the rationale of a [local government] from a written record" alone. U.S. Br. 26. Hence the need for reasons to be spelled out in denials themselves.

Moreover, requiring local governments to provide reasons for their actions in decisions denying wireless facility applications "create[]s an incentive for zoning boards to exercise principled discretion" in the first place. Ostrow, Harv. J. on Legis. at 330. This incentive "promotes more deliberate and rational decisionmaking, leading to better substantive results." *Id.*; *see also* Petr. Br. 26 (collecting other authorities). The requirement is, therefore, essential to fulfill the purpose of the Act – namely, facilitating the effective and expeditious deployment of wireless facilities.

2. That leaves the City's complaint that providing reasons in denial letters is just too hard or would interfere with the supposedly "normal processes" of local government. Resp. Br. 47-49; *see also* Nat'l League of Cities Br. 13-18 (same). There is no exception in Section 332(c)(7)(B)(iii) that excuses compliance with the provision's directives on any such basis. At any rate, the City's plea misconstrues petitioner's legal argument and imagines a burden where none exists.

Petitioner does not advocate that local governments must – like federal agencies – issue "the equivalent of findings of fact and conclusions of law." Resp. Br. 47-48. Rather, all the statute requires – consistent with the First Circuit's leading opinion on the issue – is that denial documents "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons."

Southwestern Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 60 (1st Cir. 2001).[3]

The City cannot plausibly claim that this requirement is burdensome. Once it is clear that a local government must provide reasons for a denial somewhere in writing, "those rationales [can] easily [be] incorporated into the denial letter itself." U.S. Br. 34.

Nor can the City seriously maintain that having to provide reasons in a denial itself interferes with the way local governments operate. Georgia law already routinely requires the City and other local government entities to issue decisions containing reasons when denying other kinds of land-use applications. For instance, when denying a permit for use of an abandoned cemetery, a municipality

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[3] The City's brief (at 33) contains a cryptic citation to *Todd*, perhaps meant to suggest that the City's position is somehow consistent with that case. Not so. To the extent the City intends to suggest that the First Circuit does not actually require reasons to be provided in the written decision itself, *Todd* and a subsequent First Circuit case hold squarely to the contrary. *See Todd*, 244 F.3d at 60 (decision must provide reasons "[e]ven where the record reflects unmistakably the Board's reasons for denying a permit"); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21 (1st Cir. 2002) (decision itself must provide "an adequate explanation to support judicial review"). To the extent the City intends to suggest that requiring a statement of reasons in the decision would serve little purpose because review is not limited to the reasons stated in the written decision, the First Circuit has rejected that argument too. *See, e.g., National Tower*, 297 F.3d at 21 ("A board may not provide the applicant with one reason for denial and then, in court, seek to uphold its decision on different grounds."); *see also* Petr. Br. 29-30 (other courts holding same).

"shall notify the applicant in writing of its decision . . . with written reasons therefor." Ga. Code § 36-72-7. Similar examples abound. *See, e.g., id.* § 36-36-11 (when objecting to request to zone or rezone property, county governing authority "shall . . . . document in writing the nature of the objection specifically identifying the basis for the objection"); *id.* § 36-36-34 (when denying an application to annex territory, local governments must "notify in writing the persons presenting the application, stating wherein the application is deficient"); *id.* § 44-10-28 ("In the event [a local government] rejects an application" regarding historical preservation, "it shall state its reasons for doing so and shall transmit a record of such action and the reasons therefor, in writing."). Even the City's own municipal code explicitly requires various City boards and committees to issue written decisions setting forth the reasons for the decision.[4]

Other states impose equivalent obligations on local governments, some of which apply directly to applications to construct cell towers and other wireless facilities. *See, e.g.*, Idaho Code § 67-6535(2) (denials "shall be in writing and accompanied by a

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[4] *See, e.g.*, Roswell Municipal Code § 5.5.8 (requiring the Construction Board of Adjustment and Appeals to issue a written decision and "[e]ach decision of the board shall also include the reasons for the decision"); § 4.5.15 (upon denial of an escort services license "the applicant shall be notified by mail of the denial and reasons thereof"); § 21.2.13 (if an application to the City to lease City-owned property for installation of a wireless tower is denied, the decision shall be in writing and "the determination shall include the reason for denial following review of [specified] factors"); § 21.2.23 (if renewal of a lease of City-owned property for a wireless tower is denied "the written determination shall include the reason for denial").

reasoned statement that . . . explains the rationale for the decision"); Nev. Rev. Stat. § 707.585(1) (denials "must set forth with specificity each ground on which the authority denied the approval of the application"); N.H. Rev. Stat. § 676:3 ("The local land use board shall issue a final written decision . . . provid[ing] the applicant with written reasons for the disapproval."); 53 Pa. Stat. Ann. § 10508 (denials "shall specify the defects found in the application and shall describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon.").

Local governments are easily able to discharge these duties in part because they consist of much more than the "lay" people the City references. Even if board or council members are not lawyers or full-time legislators, city and county governments typically employ professional staffs. Such personnel evaluate and make recommendations regarding all manner of applications and proposals, and then draft and issue decisions after full consideration by relevant councils or committees. The City, for example, has a city attorney and a Director of Planning and Zoning, the latter of whom issued the decision at issue here. *See* J.A. 278. No other staffing regime would make sense, given that local governments administer programs involving millions of dollars of investment annually.

The City's "woe is me" refrain, in short, has no basis in reality. The City already must provide reasons when denying various kinds of land-use applications. Local governments in other states must do so when denying precisely the kinds of applications at issue here. The City is fully capable of doing so as well.

C. Allowing Reasons For Denials To Be Stated Only In The Record Would Create Havoc In The Federal Courts.

Any doubts concerning the proper outcome here should be easily resolved on administrability grounds. Neither the City's contention that a local government's reasons for denying an application need only be capable of being "gleaned from the record" nor the Solicitor General's proposal that reasons may be "clearly set[] forth" in a document issued "at substantially the same time as the written decision" could be efficiently or evenhandedly applied in Section 332 litigation.

1. Section 332(c)(7)(B)(iii) is designed to facilitate streamlined and expeditious judicial review. Yet if a local government did not need to provide reasons for denials in denial documents themselves, courts presiding over Section 332 lawsuits would struggle to perform the threshold task of determining exactly why local governments denied applications to construct or modify wireless facilities. Courts would need to "read the record, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision" – and all this before "try[ing] to determine whether a decision thus arrived at should be sustained." *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles*, 522 P.2d 12, 19 n.15 (Cal. 1974).

Not to worry, the City says; courts would be "guided" in this task "by the legal briefs before them." Resp. Br. 25. But allowing local governments to advance reasons for denials in legal briefing would create a strong temptation for their lawyers to generate reasons after the fact, rather than merely

identifying the local governments' own reasons for denying applications. And even if lawyers did stick strictly to identifying local governments' own reasons, relying on such briefing would still unduly complicate matters. As much as those of us in the legal profession might like to think our filings invariably illuminate and clarify issues such as why a legislative entity took certain action, the City's brief vividly demonstrates that such is not always (perhaps even not usually) the case.

In particular, the City's brief never exactly says what it contends the reasons for the denial here were. The City argues at certain points that, "[t]hough not as articulate" as it might have been, "the motion of Councilmember Price" gave the City's reasons for the permit denial. Resp. Br. 22; *accord* Resp. Br. 46-47. Yet, Dr. Price's motion was only a single declarative sentence, with no reasoning or explanation. J.A. 177.

To be sure, Dr. Price preceded her motion with some personal comments criticizing petitioner's proposal. But as the Solicitor General notes, "there is no clear indication in the record that the other council members agreed with Dr. Price's reasoning." U.S. Br. 33. Consequently, "the views of Dr. Price cannot reliably be imputed to the entire group." *Id.* at 34.

The City's brief also points to a variety of other sources of potential reasons for the denial, but these references only create further confusion and uncertainty. First, the City suggests that "the reasons were contained in the minutes." Resp. Br. 21. Second, the City indicates that it denied petitioner's application because T-Mobile already "had towers and good coverage in the City, including the specific area at issue." Resp. Br. 9; *see also id.*

10-11. Third, the City asserts that T-Mobile's application conflicted with its supposed policy of promoting "newer technologies not requiring the larger traditional towers." *Id.* at 5-6. Finally, the City suggests that "even [its] city ordinance that sets forth the factors (reasons) to be considered by the Council" sets forth the basis for its denial. *Id.* at 46.

How the City would expect a district court to sort through this hodgepodge of contentions is anyone's guess. Most of the City's assertions lack any accompanying citations – and thus, not surprisingly, turn out to lack any foundation in reality.[5] Others, such as the reference to the minutes and its city code, lack any specificity, leaving one to wonder precisely which parts of the minutes or city code the City believes support its action. Contrary to the City's contention, in short, briefing on the issue of reasons does not simplify a court's task; it complicates it.

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[5] For example, the City's speculation about the alleged demise of wireless towers – for which it cites no factual support – is contradicted by specific factual data submitted by *amicus* PCIA—The Wireless Infrastructure Association. PCIA Br. at 12-14. Likewise, the City's speculation that new technologies, such as Distributed Antenna Systems, will eliminate wireless siting disputes ignores the numerous cases where local governments have unlawfully denied even applications for Distributed Antenna Systems. *See, e.g., Crown Castle NG East, Inc. v. Town of Greenburgh*, No. 12-CV-6157, 2013 WL 3357169 (S.D.N.Y. July 3, 2013), *aff'd*, 552 F. App'x 47 (2d Cir. 2014); *NextG Networks of Cal., Inc. v. City of Newport Beach*, No. SACV-10-1286, 2011 WL 717388 (C.D. Cal. Feb. 18, 2011).

Similarly, the City's assertion that T-Mobile has no gap in coverage in the area of the proposed facility conflicts with the City's own expert, who conceded T-Mobile's gap in service. Dkt. No. 106-12 at 1-2; 106-16 at 13-14.

And contrary to the City's suggestion (Br. 41-42), nothing about this case is atypical in terms of the opacity of the record. The City asserts that this is "the first time in a *circuit court* telecommunications case that the underlying district court said that it could not decipher the reasons for the local government's denial." Resp. Br. 42 (emphasis added). But this carefully crafted assertion ignores several *district court* decisions in which courts struggled – even after briefing on the issue – to determine the reasons for permit denials. *See, e.g.*, CTIA Br. 18-21 (discussing seven such cases). The City offers no formula capable of avoiding a steady run of such cases into the future.

2. The Solicitor General's attempt to devise a system for identifying reasons for denials in administrative records fares no better. Departing not only from the City's proposal but also the Eleventh Circuit's holding that "[a]ll of the written documents" in the administrative record (including "testimony of experts and concerned citizens, along with comments and questions from councilmembers") can provide reasons for denials, Pet. App. 13a, 15a, the Solicitor General offers a third approach. According to the Solicitor General, only statements in transcripts or minutes that "can fairly be imputed to the entire council" (or at least to individual council members) can count as reasons. U.S. Br. 31-33 & n.6. While perhaps intended to be stringent enough to allow for straightforward application, this proposal also crumbles in practice.

For starters, the Solicitor General's proposal depends on questionable forms of head-counting. Surveying the transcript, the Solicitor General deduces that "three of five voting members

identified aesthetic incompatibility with the surrounding area as a reason to disapprove petitioner's application." *Id.* at 31. But the Solicitor General ignores that each councilperson expressed this concern *before* voting to deny the application. It is thus unclear why a court should be able to say with confidence that those expressions actually motivated the councilpersons' votes. Certainly someone could not read a transcript of one of this Court's oral arguments and deduce that this Court based a decision on a certain reason simply because five or more Justices mentioned it during the argument.

Worse yet, the Solicitor General suggests that even "[i]f each member of a council majority gives a different reason [during a hearing] for voting to deny an application," each of those reasons must be evaluated for substantial evidence. U.S. Br. 31-32 n.6. Such a requirement would hardly seem to serve the Solicitor General's prerequisite that "[t]he statement of reasons must . . . be clear." U.S. Br. 21; *accord id.* at 16, 18, 32. It would mean that a court would need to evaluate virtually every expression of concern over the course of sometimes-lengthy hearings – often with no real way to know whether the concern actually motivated anyone's vote. How would a court decide, for example, whether an argument advanced by a council member actually motivated the member's vote if countervailing evidence and argument was presented later in the hearing? Far better to require local governments, *after* voting to deny applications, to specify the reasons for doing so in the written denials themselves. Courts can then immediately ascertain those reasons and go straight to substantial-evidence review.

The Solicitor General's proposal also depends on impracticable forms of hair-splitting. The Solicitor General asserts that "testimony given by experts and concerned citizens" in the record "does not constitute a statement of reasons for the denial *unless the council members indicate that they are voting against the application based on those reasons.*" U.S. Br. 32-33 (emphasis added). But what constitutes such an indication? Typical responses from councilpersons to expert or citizen testimony might be "that's a good point" or "thanks, we'll take that into consideration." The need for courts to categorize such statements according to whether they express a sufficient level of adoption to constitute a reason for the denial would generate uncertainty and much litigation.

The same is true with respect to the Solicitor General's assertion that one councilperson's statements cannot be attributed to others unless there is a "clear indication in the record that the other council members agreed with [the speaker's] reasoning." U.S. Br. 33. What types of indications of agreement are clear enough? The Solicitor General does not say, and courts would be sure to struggle with the issue.

3. There is still another area in which the City's and Solicitor General's approach would create problems: If a local government did not need to provide reasons in denials themselves, it would become necessary to decide when other written documents are sufficiently "contemporaneous" to satisfy Section 332(c)(7)(B)(iii). The Solicitor General proposes that the test should be whether such documents are issued "at substantially the same time" as the denials themselves. U.S. Br. 27. Once

again, questions abound. While the delay here went far beyond any acceptable limit, what exactly constitutes "substantially the same time"? The same day? The same week? Somewhere in between?

These concerns about administrability are far from theoretical. Petitioner and other wireless providers submit thousands of applications a year to construct or modify wireless facilities. They need to know what the rules are. And, as Congress recognized, they need to be able to expeditiously challenge permit denials when they believe such denials are unfounded. *See* CTIA Br. 12-16, 22-23; Chamber of Commerce Br. 19-24. The inability of the City's and Solicitor General's proposals to promise anything approaching such predictability and efficiency is not only a significant weakness, but it demonstrates the stark incompatibility of their proposals with the Act itself.[6]

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

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[6] On the last page of its brief, the City asserts that "[g]ranting an injunction requiring a local government to issue a permit" for a violation of Section 332(c)(7)(B)(iii) would "run afoul of the Tenth Amendment." Resp. Br. 56. The City has never previously raised any such Tenth Amendment argument, and the Eleventh Circuit did not address the issue of remedy. There is no basis, therefore, for this Court, to address this argument.

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September 17, 2014

SUPPLEMENTAL BRIEF

RECORD AND BRIEFS

No. 13-975

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Respondent filed its brief with the Court on August 18, 2014. On August 22, 2014, the Eighth Circuit Court of Appeals issued its ruling in *NE Colorado Cellular, Inc. v. City of North Platte, Nebraska*, No. 13-3190, 2014 WL 4116809 (8th Cir. Aug. 22, 2014), weighing in as matter of first impression for the circuit on the issue before this Court. More importantly, *North Platte* follows the Eleventh Circuit and the position taken by Respondent and its Amici herein and should therefore be considered by this Court. In its Reply Brief filed on September 17, 2014, Petitioner T-Mobile failed to bring this new decision to the Court's attention. Pursuant to Supreme Court Rule 25.6, Respondent files this Supplemental Brief to address this relevant "late authority."

In *North Platte*, NE Colorado Cellular, doing business as Viaero Wireless ("Viaero"), sought a permit to construct a telecommunications tower on property it purchased in the City's B-1 zoning district. The City's Ordinance permits towers in the B-1 district pursuant to application and receipt of a conditional use permit. The Ordinance further provides that conditional uses must "be in harmony with the character of the area and the most appropriate use of the land." *Slip op.* at 1.

Viaero filed its application for a conditional use permit on March 11, 2012, seeking to install a 100-foot cellular tower on its B-1 property to address a "lack of reliable in-building wireless service in the

City." *Id.* The City Council denied the application. The minutes of the meeting summarize the motion and resolution:

> Stoll moved and McGuire seconded the motion to find the request for a Conditional Use Permit to allow a 100' tower and communication facility building located at [the proposed tower site] does not meet the minimum standards stated in the North Platte Code of Ordinances Section 156.322 and deny the Conditional Use Permit as requested based on the following factual findings: 5. The use is not in harmony with the character of the area and it is not the most appropriate use of the land as it is a historic neighborhood and the tower would decrease property values in the area. Roll call vote: "AYE": Barrett, Stoll, McNea, McGuire, Carman, Steinbeck. "NAY": Pederson, Campbell. Motion carried.

Id.

Based on the denial, Viaero filed suit against the City alleging that the Council's decision was not in writing and was not supported by substantial evidence in the record. The district court upheld the City's denial of the use permit. The Eighth Circuit affirmed, agreeing with the Eleventh Circuit and Fourth Circuit with respect to the "in writing" requirement, finding that:

> Nowhere does the statutory text require that the denial and the "written record" be separate writings. Section 332 requires only that the denial and the record both be written.

> Section 332 does not require that the written denial state the reasons for the denial. Congress may require an agency or board to state its findings. *See, e.g.*, 5 U.S.C. § 557(c). Congress did not do so here.

Slip op. at 11. Interestingly, in reaching this conclusion, the circuit court found that courts have adopted four different interpretations of the "in writing" requirement.

It defined the first approach based on the district court decisions that require that there be a separate denial and a separate written record. In addition, the separate denial must contain written findings of fact tied to the evidence in the record so as to preclude placing the burden on the district court to "wade through the record below in an attempt to discern the Commission's rationale." *Slip op.* at 3; quoting *Omnipoint Communications, Inc. v. Planning & Zoning Commission of Wallingford*, 83 F.Supp.2d 306, 309 (D.Conn. 2000). The *North Platte* court found that this rule effectively requires formal findings of fact and conclusions of law, akin to the strictures of the Administrative Procedures Act (APA).

T-Mobile argued that a locality's separate decision must allow a wireless provider and the reviewing court to be "sure to know" the bases for the locality's decision and on what parts of the record the locality relied. (*Brief for Petitioner*, p. 22.) Even the First Circuit rejected the notion that the separate written decision it required must contain references to all facts in the record relied on by the locality:

> We stress, however, that meaningful review of the decision is not limited, as *Southwestern Bell* would have it, only to the facts specifically offered in the written decision. Again, such a requirement would place an unjustified premium on the ability of a lay board to write a decision.

Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 60 (1st Cir. 2001).

The second approach, which the court defined as the majority rule, is that adopted by the First, Seventh and Ninth Circuits holding that "the TCA requires local boards to issue a written denial separate from the written record." *Id.* This denial "must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." *New Par v. City of Saginaw*, 301 F.3d 390, 395-396 (6th Cir. 2002).

The court illustrated the third approach based on the holding in *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601 (6th Cir. 2004). In that case, "the minutes of the council meeting, which contained the resolution, constituted the only 'writing' containing the denial." *Id.* at 606. Because the Telecommunications Act (TCA) did not state that the denial had to be in a separate writing, *Southfield* found the resolution sufficient to meet the "in writing" requirement.

Finally, the court defined the fourth approach as that adopted by the Fourth and Eleventh Circuits, definitively rejecting the *Wallingford* "findings of fact" rule. The APA requires "a statement of . . . findings and conclusions, and the reasons or basis therefor." Section 332 of the TCA contains no such requirement. Noting that "Congress knows how to demand findings and explanations" and did not do so in § 332, the court determined that the "simple requirement of a 'decision . . . in writing' cannot reasonably be inflated into a requirement of a 'statement of . . . findings and conclusions, and the reasons or basis therefor.'" *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 429-430 (4th Cir. 1998). The Eleventh Circuit followed this approach holding:

> The words of the statute we are interpreting require that the decision on a cell tower construction permit application be "in writing," not that the decision be "in a separate writing" or in a "writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held" or "in a single writing that itself contains all of the grounds and explanations for the decision." *See* 47 U.S.C. § 332(c)(7)(B)(iii). So, to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to. All of the written documents should be considered collectively in deciding if the decision, whatever it must include, is in writing.

T-Mobile South, LLC v. City of Milton, Ga., 728 F.3d 1274, 1285 (11th Cir. 2013).

The Eighth Circuit found that the Fourth and Eleventh Circuits articulated the better rule because the statute does not state that denial and the written record must be separate and distinct nor does it require a written denial stating the reasons for the denial. It thus held that the City did not run afoul of the "in writing" requirement by recording its decision in the minutes in the "written record."

North Platte supports the decision at bar and the arguments of Respondent and its Amici. On the other hand, T-Mobile is advocating the first approach identified and rejected by the Eighth Circuit, along with all other circuits. Even the "majority rule" rejects a requirement of "findings of fact" as having no basis in the language of the Telecommunications Act at issue. No circuit court has adopted such a finding.

CONCLUSION

This late authority fully supports Respondent and its Amici's position in this matter that the decision of the Eleventh Circuit should be affirmed.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

T-MOBILE SOUTH, LLC, PETITIONER

v.

CITY OF ROSWELL, GEORGIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, as amended by the Telecommunications Act of 1996, 47 U.S.C. 251 *et seq.*, provides that "[a]ny decision by a State or local government * * * to deny a request to place, construct, or modify personal wireless service facilities," such as a cell tower, "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(iii).

The question presented is as follows: Whether, when denying an application for a permit to construct a new cell tower, the relevant state or local government must provide a clear statement of reasons for the denial, and, if so, whether those reasons must be set forth in the written "decision * * * to deny [the] request," 47 U.S.C. 332(c)(7)(B)(iii), or whether they may instead appear elsewhere in the written record that supports the decision.

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In the Supreme Court of the United States

No. 13-975

T-MOBILE SOUTH, LLC, PETITIONER

v.

CITY OF ROSWELL, GEORGIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

INTEREST OF THE UNITED STATES

This case presents the question whether the Communications Act of 1934, 47 U.S.C. 151 *et seq.* (Communications Act), as amended by the Telecommunications Act of 1996, 47 U.S.C. 251 *et seq.* (1996 Act), requires a state or local government, when denying an application for a permit to construct a new cell tower, to provide clear reasons for the denial, and, if so, whether those reasons must be set forth in the written "decision * * * to deny [the] request," or whether they may instead appear elsewhere in the written record that supports the decision. 47 U.S.C. 332(c)(7)(B)(iii). The resolution of that question will affect the ability of wireless communications providers to respond to the rapidly growing demand for their services. The Federal Communications Commission

(FCC or Commission) administers the Communications Act, see 47 U.S.C. 201(b); is authorized issue interpretations governing Section 332(c)(7), see *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1866 (2013); and is responsible for "mak[ing] available * * * to all the people of the United States * * * a rapid, efficient, Nation-wide * * * radio communication service with adequate facilities at reasonable charges," 47 U.S.C. 151. The United States therefore has a significant interest in the question presented.

STATEMENT

1. a. A robust national telecommunications network is "essential to the Nation's global competitiveness in the 21st century, driving job creation, promoting innovation, and expanding markets for American businesses." Exec. Order No. 13,616, 77 Fed. Reg. 36,903 (2012); see American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 516; FCC, *Connecting America: The National Broadband Plan* 9 (Mar. 16, 2010), http://download.broadband.gov/plan/national-broadband-plan.pdf (*FCC Broadband Plan*). "People are using broadband in ways they could not imagine even a few years ago," and the country's demand for these networks will continue to grow. *FCC Broadband Plan* 15; see *id.* at 15-16. Accordingly, network infrastructure that "may be adequate today likely will not meet our needs in the future." *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 27 FCC Rcd. 10,342, 10,347, ¶ 6 (2012).

Wireless technologies are an increasingly important part of the communications landscape, as

consumers use wireless technology to supplement or replace traditional phone lines and other "wired" networks. "The rapid adoption of smartphones and tablet computers, combined with deployment of high-speed 3G and 4G [wireless] technologies, is driving more intensive use of mobile networks, so much so that the total number of mobile wireless connections now exceeds the total U.S. population." *In re Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, 29 FCC Rcd. 4610, 4613, ¶ 3 (2014) (*AWS Spectrum Rule*).

That explosive growth is expected to continue. One prediction is that "total smartphone traffic over mobile networks will increase 10 times between 2013 and 2019." *AWS Spectrum Rule* 4613, ¶ 3 & n.6 (citing Ericsson, *Ericsson Mobility Report on the Pulse of the Networked Society* 7, 11 (Nov. 2013), http://www.ericsson.com/res/docs/2013/ericsson-mobility-report-november-2013.pdf). The mobile wireless industry plays an increasingly significant role in the United States economy. See *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 28 FCC Rcd. 3700, 3929, ¶ 361 (2013) (*2013 Wireless Competition Report*). By one estimate, the industry generated $146.2 billion in economic activity retained as United States gross domestic product in 2011. *Id.* at 3930, ¶ 362 & n.1110 (citing Roger Entner, *The Wireless Industry: The Essential Engine of US Economic Growth*, Recon Analytics 1 (May 2012), http://apps.fcc.gov/ecfs/document/view;jsessionid=KKDdQLC-SVmlSq66DvmdylQLdn1BKnfcs1K4HhQvy!1007083101!-2 24088 840?id=7022009489).

b. The construction and improvement of wireless networks depends on physical infrastructure, including cell towers. See *2013 Wireless Competition Report* 3906, ¶ 320. "The number of cell sites in use by wireless providers continues to grow in order to satisfy the increased demand for mobile wireless services, to expand geographic service area coverage, to improve coverage in existing service areas, and to accommodate newer technologies." *Id.* at 3906, ¶ 322. According to a trade organization report, wireless carriers used 283,385 cell sites by the end of 2011, an increase of 12 percent in just one year. *Ibid.*

While the required cellular transmission equipment can sometimes be placed on an existing "tall building, water tower * * * or other structure providing sufficient height above the surrounding area," the equipment must often instead be placed atop a "purpose-built communications tower." *2013 Wireless Competition Report* 3906, ¶ 320. Construction of such towers often requires "regulatory and zoning approvals from state and local authorities," which can act as a "significant constraint[]" on providers' ability to expand and improve their networks. *Id.* at 3908, ¶ 328; see *id.* at 3908-3909, ¶¶ 328-330.

2. a. Before 1996, local zoning board regulation "created an inconsistent and, at times, conflicting patchwork of requirements" for cell towers. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94 (1995) (*House Report*). To reduce "the impediments imposed by local governments upon the installation of facilities for wireless communications," Congress amended the Communications Act in 1996, see 1996 Act, Pub. L. No. 104-104, 110 Stat. 56, and "impose[d] specific limitations on the traditional authority of state and

local governments to regulate the location, construction, and modification of such facilities," *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005). The limitations that the 1996 Act imposes on States and localities are designed to "speed deployment and the availability of competitive wireless telecommunications services," which Congress predicted would "ultimately * * * provide consumers with lower costs as well as with a greater range [of] options for such services." *House Report* 94.

The 1996 Act imposes both substantive and procedural limitations on the authority of state and local governments to regulate the placement, construction, and modification of personal wireless service facilities. See *City of Rancho Palos Verdes*, 544 U.S. at 115. The substantive limitations provide that state and local governments "shall not unreasonably discriminate among providers of functionally equivalent services," 47 U.S.C. 332(c)(7)(B)(i)(I); shall not take actions that "prohibit or have the effect of prohibiting the provision of personal wireless services," 47 U.S.C. 332(c)(7)(B)(i)(II); and shall not regulate the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions," 47 U.S.C. 332(c)(7)(B)(iv).

As a procedural matter, States and localities must act on requests for authorization "to place, construct, or modify" wireless facilities "within a reasonable period of time." 47 U.S.C. 332(c)(7)(B)(ii). A decision denying such a request "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(iii). The House Con-

ference Report accompanying the 1996 Act explains that Congress chose "[t]he phrase 'substantial evidence contained in a written record'" in order to incorporate "the traditional standard used for judicial review of agency actions." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996) (*Conference Report*). Any person adversely affected by a final action (or failure to act) by a state or local government may commence a suit in any court of competent jurisdiction within 30 days of the final action (or failure to act), and the plaintiff is entitled to expedited judicial review. 47 U.S.C. 332(c)(7)(B)(v).

The 1996 Act includes a savings clause, which states that, "[e]xcept as provided in" Section 332(c)(7), nothing in the Communications Act "shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A).

b. In the years since the 1996 Act was enacted, Congress has supplemented and the FCC has interpreted the restrictions set forth in Section 332(c)(7). In 2009, the FCC interpreted the requirement that localities issue decisions "within a reasonable period of time," 47 U.S.C. 332(c)(7)(B)(ii), to impose a presumptive limit of 90 days for the review of collocation applications (*i.e.*, applications to install antennae that do not require the construction of a new tower), and 150 days for the review of siting applications other than collocations, see *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Vari-*

ance, 24 FCC Rcd. 13,994, 13,995, ¶ 4 (2009) (*2009 Ruling*). The FCC found its interpretation necessary because, even after passage of the 1996 Act, "wireless service providers [had] often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and * * * [these] delays [were] impeding the deployment of advanced and emergency services." *Id.* at 14,004-14,005, ¶ 32. In *City of Arlington* v. *FCC*, 133 S. Ct. 1863 (2013), the Court upheld the FCC's authority to promulgate that order interpreting Section 332(c)(7). *Id.* at 1874-1875.

In 2012, Congress further streamlined the local review process by providing that, "[n]otwithstanding" the review provisions contained in the 1996 Act, a "local government may not deny, and shall approve" requests for "modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 232 (47 U.S.C. 1455(a)) (2012 Act). That requirement facilitates the rapid approval of collocated antennae that do not require the construction of a new tower.[1]

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[1] The FCC has issued a notice of proposed rulemaking that seeks comments on a number of terms in the 2012 Act and also on issues related to remedies. The remedial issues include whether the FCC should provide that an application is "deemed granted" by operation of law where a state or local government (1) fails to act on an application within a reasonable time, as required by 47 U.S.C. 332(c)(7)(B)(ii); or (2) fails to approve a collocation request covered by the 2012 Act, 47 U.S.C. 1455(a). See *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 28 FCC Rcd. 14,238, 14,288-14,289, 14,295-14,296, ¶¶ 137-140, 161-162 (2013).

3. Petitioner provides wireless communications services to consumers pursuant to a license from the FCC. Pet. App. 19a. In 2010, petitioner submitted an application to respondent for a permit to construct a new cell tower in the City of Roswell, Georgia. *Id.* at 3a. A local ordinance establishes guidelines for the location and construction of cell towers to "encourage the development of wireless communications while protecting the health, safety, and welfare of the public and maintaining the aesthetic integrity of the community." City of Roswell, Ga., Code of Ordinances (Ordinance) § 21.2.1 (2008); see J.A. 67.

Under the local ordinance, telecommunications companies that seek to construct cell towers must submit applications to the city. In ruling on those applications, the city considers (1) proximity to residential structures; (2) the proposed height of the tower; (3) the nature of uses on the adjacent property; (4) the surrounding topography; (5) the design of the facility; (6) proposed ingress and egress; (7) the availability of existing towers, structures, or alternative technology; (8) the need for a tower at the specific location; and (9) the city's master siting plan. Ordinance § 21.2.4(a); see J.A. 71-72. The ordinance further provides that towers placed in a residential area must be "alternative tower structures only" that are compatible with the natural setting, such as man-made trees, clock towers, bell steeples, or light poles. Ordinance § 21.2.5(a); see J.A. 75; see also J.A. 68.

This case arose out of petitioner's proposal to build a 108-foot tower on a 2.8-acre parcel of vacant property in a residential neighborhood. Pet. App. 3a, 19a-20a. The proposed tower would be designed to look much like a pine tree, though it would be approximate-

ly 20 to 25 feet taller than the trees surrounding it. *Id.* at 3a-4a.

On April 7, 2010, respondent's zoning department issued a memorandum concluding that petitioner's application met all ordinance requirements for the construction of a cell tower. Pet. App. 4a, 21a. The zoning department recommended that the City Council approve the application on the conditions that petitioner: (1) move the site of the cell tower to the west property line of the proposed site, so that the tower's largest visual impact would be on the adjacent homeowner who had agreed to lease the site to petitioner; (2) construct a fence around the tower; and (3) install 33 live evergreen trees around the tower. *Ibid.*

On April 12, 2010, the City Council held a public hearing to consider petitioner's application. Petitioner's representatives spoke in support of the application, and 13 residents spoke in opposition. Pet. App. 5a-6a. Comments from the public expressed concern that the tower would be unattractive, J.A. 129-130; that petitioner did not have many customers in the area, J.A. 138; that cell towers would soon be obsolete, J.A. 140-141, 143; that petitioner's service in the area was already quite good, J.A. 141-143; that the tower would harm property values, J.A. 145-152; and that living near a cell tower is unsafe for children, J.A. 153-154, 158.

After the public discussion and a rebuttal from petitioner, the mayor invited members of the City Council to give their views. Councilmember Nancy Diamond had recused herself because of her home's proximity to the proposed tower. J.A. 111. Councilmember Jerry Orlans complimented both sides on their presentations but stated no view on whether the per-

mit should be approved or denied. J.A. 173. Councilmember Kent Igleheart stated that "one of [his] key concerns is that other carriers apparently have sufficient coverage in this area," and that his "[b]ottom line" was that it is not "appropriate for residentially zoned properties to have * * * cell towers." J.A. 173-174. Councilmember Rich Dippolito stated that he "d[id] not believe [the tower] [wa]s compatible with the natural setting." J.A. 175-176. Councilmember Becky Wynn stated that she did not think the tower was "compatible with this area." J.A. 176.

Finally, Councilmember Betty Price, the liaison to the zoning department, made remarks and then made a motion. Dr. Price stated:

> I think based on our ordinance, Article 21.2.1, which was shown on the screen earlier, the purpose and intent of our cell-phone ordinance is to protect the residential areas from the adverse impact of telecommunication towers and to minimize the number of towers and the other adverse impacts being minimized.
>
> I think the conclusion from that first section would be that this is aesthetically incompatible and certainly in this area. It's other than I-1, C-3 offices or highway commercial area.
>
> Number two, the alternative tower that was proposed, in my opinion, it would not be compatible with the natural setting and surrounding structures also due to the height being created by the other trees.[2]

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[2] The meeting's minutes reflect that Dr. Price stated that the tower would not be compatible with the natural setting "due to the

> And, number three, in our Ordinance 21.2.4, the proximity to residential structures, the nearness to other homes, and being within the residential zoning area and adjacent properties, therefore, the adverse effects to the enjoyment of those neighbors and potential loss of resale value among other potential parameters are difficult really to definitively assess.
>
> Therefore, overall, I move to deny the application for the wireless facility monopine tower on Lake Charles Drive.

J.A. 177. Councilmembers Orlans and Wynn seconded the motion, and the motion passed unanimously. J.A. 340.

On April 14, 2010, the director of the zoning department sent a letter informing petitioner that the application had been denied. Pet. App. 9a. The letter stated:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at 770-641-3727.

J.A. 278; see Pet. App. 9a. Detailed minutes of the April 12, 2010, hearing were not approved by the City Council until a meeting held on May 10, 2010. Those detailed minutes (J.A. 321-341) replaced the City Council's "brief minutes" that had previously been

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height being *greater* than the other trees." J.A. 340 (emphasis added).

adopted on April 19, 2010. See City of Roswell, *Meeting of Mayor and City Council Zoning* (May 10, 2010), https://roswell.legistar.com/MeetingDetail.aspx?ID=101786&GUID=63828B21-EB83-4485-B4EA-10 EE65CF48CD&Options=info|&Search= (5/10/10 Minutes). Additionally, petitioner had arranged for a court reporter to transcribe the City Council meeting, and the transcript was available on April 19, 2010. Pet. App. 16a; Pet. Br. 12 n.2.

On May 13, 2010, 29 days after respondent had informed petitioner that its application had been denied, petitioner filed a complaint in federal district court pursuant to Section 332(c)(7), alleging that the city's denial of petitioner's application was not supported by substantial evidence in the record and would have the effect of prohibiting the provision of personal wireless services, in violation of Section 332(c)(7)(B)(i)(II). Pet. App. 9a, 22a. Petitioner sought an injunction compelling the city to grant the requested permit. *Ibid.*

3. The district court granted summary judgment to petitioner. Pet. App. 19a-35a. The court concluded that respondent had violated Section 332(c)(7)(B)(iii) "by failing to issue a written decision stating the reasons for its denial of [petitioner's] application." *Id.* at 25a. The court explained that "[t]he 'in writing' requirement demands something more than a bare written statement of denial, because the judicial review contemplated by the [1996 Act] is frustrated if a reviewing court has no means to ascertain the rationale behind the decision." *Id.* at 27a. The court held that, to satisfy the "in writing" requirement, a written decision "must (1) be separate from the written record; (2) describe the reasons for the denial; and

(3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." *Id.* at 27a-28a (citation omitted).

Respondent argued that its letter of denial satisfied the "in writing" requirement because it referred to the minutes of the meeting and because a transcript of the meeting was available. Pet. App. 28a. In rejecting that contention, the district court observed that "[t]he minutes and transcript of the hearing reflect questions and comments by individual Council members, but nowhere is there a clear articulation of the rationale of the Council as a whole for denying the application." *Ibid.* The court explained that respondent had offered three justifications for the denial: the tower's aesthetic incompatibility with the neighborhood, its adverse impact on property values, and petitioner's failure to demonstrate a need for the tower. *Id.* at 30a. The court stated that "none of these reasons was cited by a majority of the council members as a basis for their vote to deny the application." *Ibid.*[3] The court concluded that, because it could not determine respondent's rationale for the decision to deny the application, it was unable to assess whether respondent's decision was supported by substantial evidence. *Id.* at 33a.

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[3] In support of that statement, the district court noted that "[t]hree of the six council members (Dippolito, Wynn, Price) cited the tower's incompatibility with the neighborhood." Pet. App. 30a. The court counted Kay Love as one of "the six Council members who voted." *Id.* at 28a. As explained below, pp. 29-30, *infra*, Ms. Love is not a member of the City Council, and only five council members voted on the motion.

Because the district court concluded that respondent had violated the "in writing" requirement, it did not consider whether respondent's decision was supported by substantial evidence in the written record or whether the decision would effectively prohibit petitioner from providing wireless services, in violation of Section 332(c)(7)(B)(i)(II). Pet. App. 10a-11a, 25a. The court ordered respondent to grant petitioner's permit application. *Id.* at 34a-35a.

4. The court of appeals reversed. Pet. App. 1a-18a.

a. The court of appeals relied on its decision in *T-Mobile South, LLC* v. *City of Milton*, 728 F.3d 1274 (11th Cir. 2013), which was decided while petitioner's appeal in this case was pending. In *City of Milton*, the court stated that, because a local government's denial of a permit application must be supported by substantial evidence, "there must be reasons for the denial that can be gleaned from the denial itself or from the written record." *Id.* at 1283. The court held in *City of Milton* that, "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." *Id.* at 1285. The court explained that the written documents available to T-Mobile in *City of Milton* had included transcripts of the City Council hearings, denial letters, and detailed minutes of the hearings. *Id.* at 1285-1286. The court stated that "T-Mobile had access to all of those documents before its deadline for filing the lawsuit, and collectively they are enough to satisfy the writing requirement of [Section] 332(c)(7)(B)(iii)." *Id.* at 1286.

b. Relying on its decision in *City of Milton*, the court of appeals in this case concluded that respond-

ent had likewise satisfied the "in writing" requirement of Section 332(c)(7)(B)(iii). Pet. App. 16a. The court explained that respondent had provided petitioner with "a written letter clearly stating that the City Council had denied [petitioner's] request to build the proposed cell tower." *Id.* at 15a. The court further explained that the letter had informed petitioner that written minutes were available and had provided contact information for assistance in obtaining the minutes. *Ibid.*

The court of appeals concluded that the minutes of the relevant City Council meeting adequately explained the reasons for respondent's denial of petitioner's application. The court stated that those minutes "summarize the testimony of experts and concerned citizens, along with comments and questions from councilmembers"; recount the reasons given by Dr. Price in support of her motion; indicate that two additional council members seconded the motion; and state that the motion passed unanimously. Pet. App. 15a. The court further stated that petitioner "received, or at least could have received, an even more detailed written account of [respondent's] decision" to deny the application by obtaining a transcript of the hearing, which was available on April 19, 2010. *Id.* at 16a.

SUMMARY OF ARGUMENT

A. In the 1996 Act, Congress imposed specific limitations on the traditional authority of state and local governments to regulate the construction of cell towers. One such limitation is the requirement that any decision to deny permission to construct a cell tower "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C.

332(c)(7)(B)(iii). The substantial-evidence standard is borrowed from administrative law, and this Court has long recognized that courts cannot conduct substantial-evidence review unless the agency explains its reasoning. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). By authorizing substantial-evidence review of siting decisions made by state and local governments, Congress has imposed a corollary requirement that the relevant governmental body must provide a clear statement of its reasons for denying an application to construct a cell phone tower. Such a statement is also necessary for the reviewing court to determine whether the state or local government has denied an application for reasons that are prohibited by the 1996 Act.

B. Although state and local governments must give reasons for denying cell tower applications, those reasons need not be provided in the written denial itself, so long as they are clearly reflected somewhere in the written record. Local zoning boards often operate by discussing an issue at a hearing and then producing written minutes of the meeting. So long as those minutes or another document in the written record clearly sets forth the reasons for denial of the application, the 1996 Act should not be read to disrupt that traditional practice.

If a state or local government relies upon the written record to supply its statement of reasons, however, the written record must be available at substantially the same time as the decision denying the request. The contemporaneous availability of such documents is necessary not only to satisfy the "in writing" requirement, but also to enable the applicant to deter-

mine, within the 30-day time limit provided in the statute, whether to seek judicial review.

C. Respondent did not timely provide a written statement of reasons for its denial of petitioner's permit application. Although respondent sent petitioner a letter stating that the City Council had denied petitioner's application, that letter contained no reasons for the decision, and the meeting minutes referenced in the letter were not available to petitioner at substantially the same time. And while petitioner itself prepared a transcript that was available roughly one week after the hearing, an applicant's ability to reduce a local government's oral decision to writing does not transform the government's oral decision into a written one. The facts of this case, in which the transcript misidentifies a city employee as a voting council member, demonstrate why the local government must itself provide a transcript that it can review and approve before the transcript can be considered a written statement of reasons from the government.

If the detailed minutes or a transcript created by respondent had been made available to petitioner at substantially the same time as petitioner's application had been denied, either document would have sufficed as a statement of reasons for the denial. In their oral statements during the hearing, a majority of the council members clearly identified aesthetic incompatibility with the neighborhood as a reason why they were voting to deny petitioner's application.

In concluding that respondent had provided an adequate statement of reasons contained in the written record, the court of appeals cited the testimony of experts and concerned citizens offered during the City Council hearing. Only statements by council members

indicating that they were persuaded by such testimony, however, can satisfy the statutory requirement that the government itself provide a statement of reasons. The court also viewed the reasons given by Dr. Price before she moved to deny petitioner's application as attributable to the City Council as a whole, given that the motion passed unanimously. There is no clear indication in the record, however, whether the other council members agreed with Dr. Price's rationales, or instead simply supported her motion for their own previously-stated reasons.

ARGUMENT

47 U.S.C. 332(c)(7)(B)(iii) REQUIRES A STATE OR LOCAL GOVERNMENT TO PROVIDE A CLEAR STATEMENT OF REASONS FOR THE DENIAL OF A REQUEST TO CONSTRUCT A CELL TOWER, BUT THE STATEMENT OF REASONS DOES NOT NEED TO APPEAR IN THE WRITTEN DECISION DENYING THE REQUEST

A. State And Local Governments Must Provide A Clear Statement Of Reasons For Denying Permission To Construct A Cell Tower

1. a. In the 1996 Act, Congress "impose[d] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of" facilities for wireless communication. *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005). One such limitation is the requirement that "[a]ny decision by a State or local government * * * to deny a request" for permission to construct a cell tower "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(iii).

In imposing that requirement, Congress understood that it was incorporating "the traditional standard used for judicial review of agency actions." *Conference Report* 208. For example, under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, when a court reviews an agency decision that is "bound up with a record-based factual conclusion," the court "reviews an agency's reasoning to determine whether it is * * * supported by substantial evidence." *Dickinson* v. *Zurko*, 527 U.S. 150, 164 (1999) (internal quotation marks omitted); see 5 U.S.C. 706(2)(E) (a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be * * * unsupported by substantial evidence").

In order to evaluate whether a local government's decision is "supported by substantial evidence contained in [the] written record," 47 U.S.C. 332(c)(7)(B)(iii), a reviewing court must identify the reason or reasons why the application was denied. This Court has long recognized that "courts cannot exercise their duty of [substantial-evidence] review unless they are advised of the considerations underlying the action under review." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). Thus, under established principles of administrative law, courts "will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion." *Morgan Stanley Capital Grp., Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 544 (2008) (citing *Chenery*, 318 U.S. at 94-95); see *Chenery*, 318 U.S. at 94 ("The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropri-

ate safeguard for the interests protected by the Act. There must be such a responsible finding.").

In this respect, by requiring that any denial of a request for permission to construct a cell tower be supported by substantial evidence, and by authorizing judicial review to determine whether that requirement has been satisfied, Congress has imposed requirements on state and local governments that are more stringent than the rational-basis standard ordinarily applied to legislative acts in the economic sphere. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). And "because [the Court] never require[s] a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315; see *United States* v. *O'Brien*, 391 U.S. 367, 376-377, 384-385 (1968).

In conducting substantial-evidence review, by contrast, the court must confine itself to the rationales actually proffered by the agency as bases for its decision. By requiring that state and local government cell-tower siting decisions be supported by substantial evidence, and by authorizing judicial review of those decisions, Congress effectively imposed a corollary requirement that the local government state its reasons for denying permission to construct a cell tower, so that substantial-evidence review can be conducted.

Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487 (1951) ("It would be mischievous word-playing to find that the scope of [substantial-evidence] review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act.").

The statement of reasons must also be clear. "If * * * [substantial-evidence] review is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record." *MetroPCS, Inc.* v. *City & Cnty. of S.F.*, 400 F.3d 715, 722 (9th Cir. 2005). Accordingly, although courts may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), a court may not "guess as to the agency's findings or reasons," *Greater Bos. Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

A statement of reasons also enables the reviewing court to determine whether the local government has denied the application for a reason that is prohibited by the 1996 Act. Under the statute, a State or locality may "not unreasonably discriminate among providers of functionally equivalent services," and may not prohibit construction of personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions." 47 U.S.C. 332(c)(7)(B)(i)(I) and (iv). To enforce those statutory prohibitions, a reviewing court will often need to ascertain why the government denied permission to construct a cell tower.

b. For the foregoing reasons, the courts of appeals have generally held that Section 332(c)(7)(B)(iii) requires a state or local government to provide a state-

ment of reasons when denying a request for permission to construct a cell tower. See *Southwestern Bell Mobile Sys., Inc.* v. *Todd*, 244 F.3d 51, 60 (1st Cir. 2001) ("[P]ermitting local boards to issue written denials that give no reasons for a decision would frustrate meaningful judicial review."); *New Par* v. *City of Saginaw*, 301 F.3d 390, 395-396 (6th Cir. 2002) (same); *Helcher* v. *Dearborn Cnty.*, 595 F.3d 710, 719 (7th Cir. 2010) ("The 'in writing' requirement is met so long as the written decision contains a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons."); *MetroPCS*, 400 F.3d at 722 (9th Cir.) ("[T]he purposes of the 'in writing' requirement would be ill-served by allowing local zoning authorities to issue [an] * * * opaque, unelaborated ruling."); but see *AT&T Wireless PCS, Inc.* v. *City Council of City of Va. Beach*, 155 F.3d 423, 429-430 (4th Cir. 1998) (explanation of decision not required).[4]

2. The 1996 Act contains a savings clause, which states that, "[e]xcept as provided in [Section 332(c)(7)], nothing in this chapter shall limit or affect the authority of a State or local government * * * over decisions regarding the placement,

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[4] The Eleventh Circuit's position on this issue is somewhat unclear. That court has stated that the substantial-evidence requirement "necessarily means that there must be reasons for the denial that can be gleaned from * * * the written record." *T-Mobile S., LLC* v. *City of Milton*, 728 F.3d 1274, 1283 (2013). In the same opinion, however, the court also stated that, "*to the extent that the decision must contain grounds or reasons or explanations*, it is sufficient if those are contained in a different written document or documents." *Id.* at 1285 (emphasis added)); see *id.* at 1286 ("We need not consider whether something less than or different from all of th[e]se documents would be enough.").

construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). As explained above, however, the requirement of a written statement of reasons for a denial is inherent in Section 332(c)(7)(B)(iii)'s express requirement that any such denial "shall be in writing and supported by substantial evidence contained in a written record." Because the introductory language of the savings clause ("[e]xcept as provided in [Section 332(c)(7)]") recognizes that Section 332(c)(7) constrains the authority of state and local governments in this context, the savings clause does not prevent the Court from giving Section 332(c)(7)(B)(iii) its most natural reading.

To be sure, under the rational-basis principles described above, see p. 20, *supra*, local zoning boards *ordinarily* need not provide reasons for their decisions, and members of city councils will *ordinarily* operate free of any obligation to state reasons for voting in a particular way. The 1996 Act alters that ordinary scheme, however, by placing "specific limitations on the traditional authority of state and local governments" when those governments rule on cell-tower siting applications. *City of Rancho Palos Verdes*, 544 U.S. at 115. By requiring that decisions denying permission to build cell towers be in writing and supported by substantial evidence, Congress has mandated that, in this specific context, zoning authorities must use more formal procedures than they might otherwise use, including the provision of a clear statement of reasons for any denial.

B. The State Or Local Government's Statement Of Reasons Need Not Appear In The Written Decision Denying The Request, So Long As The Reasons For The Denial Are Included In A Contemporaneously Available Written Record

1. Petitioner endorses a rule (Pet. Br. 17-40) adopted by the First Circuit in *Todd*, *supra*, under which a state or local government must state its reasons for denying an application to construct a cell tower in a written "decision * * * to deny," 47 U.S.C. 332(c)(7)(B)(iii), that is separate from the written record. Under that rule, a statement of reasons cannot be incorporated from elsewhere in the written record. See *Todd*, 244 F.3d at 60; see also *MetroPCS*, 400 F.3d at 723; *New Par*, 301 F.3d at 395-396. The 1996 Act does not impose such an inflexible requirement.

Although Congress's provision for substantial-evidence review imposes a corollary requirement that the local government give reasons for denying an application to construct a cell tower, the statute neither explicitly nor implicitly requires that those reasons be provided in the written denial itself. Consistent with the savings clause, 47 U.S.C. 332(c)(7)(A), permitting the statement of reasons to be incorporated from the written record minimizes the intrusion on the normal processes of local governments, which are often composed of laypeople who are not accustomed to writing opinions setting forth the reasons for their actions. As reflected in decisions addressing this issue, local zoning boards or city councils often operate by discussing an issue during a hearing, and then providing "minutes" or a written summary of what transpired at the meeting, which are reviewed and

may be amended by the board. See, *e.g.*, *T-Mobile S., LLC* v. *City of Milton*, 728 F.3d 1274, 1278-1280 (11th Cir. 2013); *Helcher*, 595 F.3d at 715; *New Par*, 301 F.3d at 396. The 1996 Act should not be read to disturb that process, so long as the minutes or another document in the record clearly sets forth the reasons for the denial.

A strict requirement that the state or local government include a statement of reasons in a "decision * * * to deny" that is separate from the written record would often serve little purpose. 47 U.S.C. 332(c)(7)(B)(iii). So long as the written record provides a clear statement of the reasons for the denial of an application, a reviewing court can assess whether those reasons are supported by substantial evidence and permitted by the statute. That approach is consistent with the established administrative-law principle that an agency's "procedure of affirming and adopting wholesale the reasoning of the [administrative law judge] without further elaboration * * * ordinarily provides * * * sufficient explanation of the basis of the decision both to the parties and to reviewing courts." *United Food & Commercial Workers Int'l Union, AFL-CIO, Local 150-A* v. *NLRB*, 880 F.2d 1422, 1436 (D.C. Cir. 1989).

Nor would it "frustrate meaningful judicial review," *Todd*, 244 F.3d at 60, to allow local boards to rely on reasons given elsewhere in the record. To the contrary, in some cases the written record of a local government proceeding may provide a statement of reasons that is perfectly clear. In *AT&T Wireless PCS, Inc.* v. *Winston-Salem Zoning Board of Adjustment*, 172 F.3d 307 (4th Cir. 1999), for example, a local zoning ordinance required the board to make

four specific findings in order to approve a wireless tower, *id.* at 310-311. The zoning board voted on each finding separately, concluding that the proposal satisfied the first three criteria but not the fourth because "the tower would not be 'in harmony with the area in which it is to be located.'" *Id.* at 311. Minutes of such a meeting would satisfy the "in writing" requirement of Section 332(c)(7)(B)(iii) because a reviewing court could readily discern the zoning board's reasons for the decision. Similarly in *Helcher*, *supra*, a local board relied on the minutes themselves, once approved by the board, as the written denial. 595 F.3d at 716. Those minutes made clear that the council had voted in favor of a motion to deny the application "as a result of * * * noncompliance" with specific ordinances. *Id.* at 722. Because that writing "provide[d] an explanation that allow[ed the court], in combination with the written record, to determine if the decision [was] supported by substantial evidence," the Seventh Circuit concluded that the minutes were sufficient to satisfy the "in writing" requirement. *Ibid.*

To be sure, it may sometimes be difficult to discern the rationale of a legislative body from a written record, and the local government may be better served by including a separate statement containing its reasons. But in cases where a clear statement of reasons appears in the written record, those reasons need not be repeated in the separate decision denying the applicant's request.

2. If a local government relies upon the written record to supply its statement of reasons for denying permission to construct a cell tower, the written record containing the statement of reasons must be made

available at substantially the same time as the written decision denying the request.

If the local government gives clear reasons for the denial orally at a hearing, a transcript of the hearing, if timely provided by the local government, may serve as a written statement of reasons. In contrast, many local governments rely on minutes as the official written documentation of what occurred at a hearing, and meeting minutes often are not available until they are approved at the next board meeting. See, *e.g.*, *Helcher*, 595 F.3d at 715. Meeting minutes that are not available at substantially the same time as the written denial cannot serve as the written statement of reasons for the denial.

The 1996 Act requires state and local governments to act on wireless siting applications "within a reasonable period of time." 47 U.S.C. 332(c)(7)(B)(ii). The FCC has interpreted that requirement as generally allowing 90 days for collocation applications and 150 days for siting applications other than collocations. *2009 Ruling* 13,995, ¶ 4. So long as the meeting minutes are prepared and approved within the pertinent 90- or 150-day window, a local government can comply with all applicable requirements by deferring transmission of its written denial to the applicant until those minutes are available for contemporaneous transmission.

The contemporaneous availability of any documents from the written record that set forth the local government's reasoning is necessary not only to satisfy the "in writing" requirement, but also to give the applicant information necessary to determine whether judicial review is warranted. A person adversely affected by a final action of a state or local govern-

ment may bring suit "within 30 days after such action." 47 U.S.C. 332(c)(7)(B)(v). If the local government's reasons for the denial are not available at substantially the same time as the denial itself, the applicant cannot make an informed decision, within the time provided by the statute, whether to exercise its right to seek judicial review.

C. Respondent Did Not Provide A Contemporaneously Available Written Statement Of Reasons For Its Denial Of Petitioner's Permit Application

Under the standard set forth above, respondent violated the requirement that its decision to deny petitioner's request must be "in writing," 47 U.S.C. 332(c)(7)(B)(iii), because respondent did not timely provide a written statement of reasons for the denial.

1. On April 14, 2010, respondent sent petitioner a letter stating that the City Council had denied petitioner's application to construct a cell tower during a meeting held on April 12, 2010, and that "[t]he minutes from the aforementioned hearing [could] be obtained from the city clerk." Pet. App. 9a. Those minutes were not available, however, at substantially the same time as the decision denying petitioner's application. See *id.* at 9a, 16a. Instead, the City Council adopted "brief minutes" on April 19, 2010, and it did not approve the detailed minutes until May 10, 2010—four days before petitioner's time for seeking judicial review of respondent's decision would expire. See 5/10/10 Minutes. Because of the substantial gap between the written denial of petitioner's application and respondent's issuance of the detailed minutes, respondent did not provide a timely written statement of reasons for the denial.

2. The transcript that petitioner created by hiring a court reporter to transcribe the meeting also does not suffice as a written statement of reasons for respondent's denial of petitioner's application. One would not normally consider a city council to have issued a decision "in writing" when it does so orally, even if the council makes it possible for private parties to reduce the oral decision to written form.

The facts of this case illustrate why a hearing transcript created by the applicant, as distinct from minutes or a transcript that is created and approved by the governmental body itself, is not sufficient to constitute the local government's written decision. The transcript in this case contains at least one significant error that may have affected the district court's view of whether an adequate statement of reasons had been provided. The transcript identifies the City Administrator, Kay Love, as a seventh member of the City Council. See J.A. 110. Ms. Love, however, is not a member of the City Council. See J.A. 321 (minutes listing Ms. Love under category "Staff Present" as the City Administrator); City of Roswell, *City Council*, http://www.roswellgov.com/index/aspx?nid=74 (last visited July 9, 2014) (list of City Council members).

In concluding that the minutes and transcript of the April 12, 2010, hearing did not provide a "clear articulation of the rationale of the Council as a whole for denying the application," the district court stated that "[t]hree of the six council members (Dippolito, Wynn, Price) cited the tower's incompatibility with the neighborhood," but that "no[] * * * reason[] was cited by a majority of the council members." Pet. App. 28a, 30a. In making that observation, the court, presumably based on the transcript created by the

court reporter hired by petitioner, mistakenly counted Ms. Love as a sixth voting council member, after the recusal of Ms. Diamond. See *id.* at 28a ("Of the six Council members who voted, one (Kay Love) did not speak at all during the hearing."); see also *id.* at 7a n.2 (court of appeals stating that "Councilmember Kay Love was present at the hearing but did not comment"); compare J.A. 110 (transcript listing seven council members), with J.A. 321 (minutes listing six council members). It therefore appears that a majority of the five voting members of the City Council identified incompatibility with the neighborhood as a reason for denying petitioner's application. That error in the transcript highlights the importance of the local government's providing the applicant with a written statement of reasons for the denial, rather than relying on the ability of the applicant, who may be unfamiliar with the local government and its operations, to reduce an oral hearing to writing.[5]

3. If the detailed minutes or a transcript created and approved by respondent had been made available to petitioner at substantially the same time as the decision denying petitioner's application, either docu-

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[5] Other, less significant errors reinforce the same point. For example, the transcript states that one of Dr. Price's reasons for moving to deny petitioner's application was the tower's incompatibility with the natural setting "due to the height being *created by* the other trees"—which could have been a reference to the zoning board's recommendation that petitioner's application be granted on the condition that petitioner install 33 evergreen trees around the proposed tower. J.A. 177 (emphasis added); see Pet. App. 4a, 21a. The minutes, on the other hand, reflect that Dr. Price was concerned with the tower's incompatibility with the natural setting "due to the height being *greater than* the other trees"—a complaint about the tower itself. J.A. 340 (emphasis added).

ment would have sufficed as a statement of reasons for the denial.

a. In the minutes (and in the transcript), four of the five voting council members stated their reasons for denying petitioner's application. Mr. Igleheart stated that "one of [his] key concerns is that other carriers apparently have sufficient coverage in this area," and that his "[b]ottom line" was that it is not "appropriate for residentially zoned properties to have * * * cell towers." J.A. 173-174. Mr. Dippolito stated that he "d[id] not believe [the tower] [wa]s compatible with the natural setting." J.A. 175-176. Ms. Wynn stated that she did not think the tower was "compatible with this area." J.A. 176. And Dr. Price stated that the tower was "aesthetically incompatible" with the area, was not compatible with the natural setting, and would harm the enjoyment and resale value of adjacent property. J.A. 177. Mr. Orlans provided no explanation for his vote, J.A. 173, and Ms. Diamond recused herself, J.A. 111.

A majority of the City Council (three of five voting members) thus identified aesthetic incompatibility with the surrounding area as a reason for voting to disapprove petitioner's application. If the minutes or transcript had been provided to petitioner at substantially the same time as the letter communicating the denial, Section 332(c)(7)(B)(iii)'s requirements would have been satisfied, even though the letter itself did not explain the City Council's rationale.[6]

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[6] As explained in the text, in this case, a majority of the voting members of the relevant governing body agreed on one reason for denying petitioner's application. Although majority agreement on a single rationale is sufficient to satisfy the 1996 Act's "in writing" requirement, it is not clear that such agreement is necessary. If

b. The court of appeals concluded that the minutes and transcript adequately stated the reasons for respondent's denial of the permit application because they "summarize[d] the testimony of experts and concerned citizens, along with comments and questions from councilmembers," and because they recounted the reasons given by Dr. Price in support of her motion, which passed unanimously. Pet. App. 15a. Neither of those features of the minutes and transcript provides a clear statement of reasons for the City Council's decision to deny petitioner's application.

A summary of the testimony given by experts and concerned citizens at the hearing does not constitute a

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each member of a council majority gives a different reason for voting to deny an application, but each reason is permissible and supported by substantial evidence in the record, that combination of rationales would likely be a proper basis for upholding the local government's decision. See *Corus Grp. PLC* v. *ITC*, 352 F.3d 1351, 1363 (Fed. Cir. 2003) (stating that, "in reviewing a[n] [International Trade] Commission determination, each of the various separate opinions making up the majority decision is subject to judicial scrutiny under the applicable statutory standard," and that "[i]f any opinion necessary to the majority * * * fails to satisfy the statutory standard, the decision must be set aside"); *United States Steel Grp.* v. *United States*, 96 F.3d 1352, 1361-1362 (Fed. Cir. 1996) (concluding that commissioners of the International Trade Commission were permitted to engage in different reasoning to reach the same conclusion); *NLRB* v. *American Can Co.*, 658 F.2d 746, 753 (10th Cir. 1981) (stating that there was "no lack of clarity" in the National Labor Relations Board's opinion, in which the Board members "made their views plain in three separate opinions," and that "there is no decision which holds that the lack of a majority rationale renders the Board's orders unenforceable"); but see *Chicago Local No. 458-3M* v. *NLRB*, 206 F.3d 22, 30 (D.C. Cir. 2000) (assuming that the court needed to identify "a majority-supported conclusion of law that the court c[ould] review").

statement of reasons for the denial unless the council members indicate that they are voting against the application based on those reasons. In this case, for example, there was testimony that property values would be harmed, J.A. 145-152, along with testimony that property values would not be harmed, J.A. 164-167, and petitioner's representatives gave a rebuttal to the opposition testimony offered during the hearing, J.A. 161-171. Only statements of the council or its members that they are voting to deny the application for one or more of the reasons given by experts or concerned citizens—and not the views expressed in that testimony by the citizens themselves—can constitute a statement of reasons for the council's decision.

The court of appeals was also wrong in suggesting, see Pet. App. 15a, that the reasons given by Dr. Price before she moved to deny petitioner's application can fairly be imputed to the entire council. Before she moved to deny petitioner's application, Dr. Price stated her view that the tower would be aesthetically incompatible with the area; that a monopine tower, "in [her] opinion," would not be compatible with the natural setting; and that the tower would negatively affect the enjoyment and resale values of nearby property. J.A. 177. Although the voting members then unanimously voted in favor of Dr. Price's motion to deny the application, Pet. App. 15a, there is no clear indication in the record that the other council members agreed with Dr. Price's reasoning.

A council member who disagreed with some or all of Dr. Price's stated reasons for making the motion, but who believed for other reasons that petitioner's application should be denied, would presumably have voted in favor of the motion itself. The council could

have endorsed Dr. Price's reasoning by incorporating her rationales into the decision denying petitioner's application, or into another contemporaneously-issued written document, but the council chose instead to rely on a written record that reflects individual statements made by each council member. In those circumstances, the views of Dr. Price cannot reliably be imputed to the entire group.

The facts of this case underscore that, although the 1996 Act does not *require* a zoning authority to provide a statement of reasons in the decision denying a request for permission to construct a cell tower, a local zoning board would be well-advised to provide such a statement. If in fact the other voting members agreed with Dr. Price's rationales, as well as with her bottom-line conclusion that petitioner's application should be denied, those rationales could easily have been incorporated into the denial letter itself or into an accompanying document that was unambiguously transmitted on behalf of the council as a body. In some cases, a statement of reasons as short as a single sentence could satisfy the 1996 Act's requirements. By providing such a statement, a state or local government that denies a cell-tower siting application can protect itself against the risk that its reasons for acting will be unclear to a reviewing court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 13-975

IN THE

Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business. It is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

The Chamber and NFIB have a direct interest in this case. Economic growth both in the wireless industry and the national economy depend on rapid deployment of wireless infrastructure throughout the country. One study estimates that the industry's investment in expanding wireless infrastructure produces up to a ten-fold return for the domestic economy. The proper interpretation of the Telecommunications Act of 1996, which removed state and local barriers to deployment, is therefore central to the nation's continued economic growth. Accordingly, the Chamber and NFIB respectfully submit this brief and respectfully urge the Court to reverse the Eleventh Circuit's judgment.

SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 ("1996 Act") amended the Communications Act of 1934 ("Act") to accelerate deployment of wireless infrastructure facilities. To that end, the 1996 Act "impose[s] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). "State and local practices that unreasonably delay the siting of personal wireless service facilities ... impede the promotion of advanced services and competition that Congress deemed critical[.]"[2] Under the statute, therefore, "[s]tate and local authorities ...

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2. *Petition For Declaratory Ruling To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 F.C.C.R. 13994, 14008 (2009) ("*Shot Clock Order*"), *aff'd, City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

remain free to make siting decisions. They ... do so, however, subject to minimum federal standards—both substantive and procedural—as well as federal judicial review." *Id.* at 128 (Breyer, J., concurring).

One of the 1996 Act's key procedural protections for wireless carriers is the requirement that "[a]ny decision by a State or local government ... to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Requiring a zoning authority to produce a "'written record' *and give reasons* for denials 'in writing,'" *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring) (emphasis added), enables the court to fulfill its duty to "hear and decide" a carrier's challenge "on an expedited basis," 47 U.S.C. § 332(c)(7)(B)(v).

Requiring zoning boards to "give reasons for denials" adheres to the ordinary meaning of "decision." Although "decision" has a range of meanings, it is fairly interpreted in this context to require more than a bare disposition. Elsewhere in the Act, Congress used the term "decision" to signal that the decisionmaker must set forth the rationale for the disposition—not just provide notification. When Congress requires only a disposition, in contrast, the Act employs the term "order" or "notify." There is no reason to interpret "decision" differently in Section 332(c)(7)(B)(iii). Congress's decision to borrow the "substantial evidence" standard from federal administrative law confirms this understanding. That standard has always been understood as requiring the agency to provide reasons for its action to facilitate judicial review.

The Fourth Circuit and Eleventh Circuit, however, have rendered this important requirement meaningless by misinterpreting the statute. The Fourth Circuit has ruled that a zoning authority need not set forth reasons for its denial and can meet the "decision ... in writing" obligation merely by stamping the application "denied." *See AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998). But the Fourth Circuit confused "fair meaning" textualism with the long discredited practice of "strict constructionism." *Reading Law: The Interpretation of Legal Texts*, Antonin Scalia & Bryan A. Garner 356 (1st ed. 2012). The interpretative objective is to identify the fairest reading of the text—not the narrowest one. The fairest reading of this provision is one that requires the zoning board to concisely explain its rationale for denying the carrier's application, not just spill ink on paper and declare itself in compliance with federal law.

The Eleventh Circuit's approach is also misguided. That court assumed (but did not concede) that the zoning board must provide reasons for the denial, yet incorrectly concluded that the obligation is satisfied so long as those reasons can be found somewhere in the written record. *See T-Mobile South, LLC v. City of Milton, Ga.*, 728 F.3d 1274, 1277 (11th Cir. 2013). The Eleventh Circuit ignored a cardinal principle of statutory construction: by requiring a "decision ... in writing *and* ... a written record" Congress imposed independent duties on zoning authorities. The written record is not a substitute for the written decision. *See Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001). Contra the Eleventh Circuit, the law requires both.

Requiring judges to scour the written record in search of a rationale also is incompatible with Congress's goal of accelerating deployment and streamlining judicial review. Litigation over rejected siting applications already takes years notwithstanding the 1996 Act's mandate for expedited review. An "opening phase of litigation," Brief for Petitioner 29 ("Pet. Br.")—over why the zoning board denied the application—so the court *then* can decide if that rationale is supported by substantial evidence, will make the process intractable or, worse still, lead carriers to abandon infrastructure initiatives in those regions where local resistance is most egregious.

Importantly, this needless legal wrangling would cause economic harm far beyond its detrimental impact on the parties to the litigation. "Wireless services are central to the economic, civic, and social lives of over 270 million Americans." *Shot Clock Order*, 24 F.C.C.R. at 13995. The wireless industry has invested $223 billion in the economy over the last decade and is responsible for creating nearly 4 million jobs. The industry therefore occupies a critical role in the nation's overall economic health. In fact, one recent study found that every $1 invested in wireless infrastructure creates an additional $7-$10 of Gross Domestic Product ("GDP"). In light of Congress's goal of encouraging infrastructure investment, there is no reason to delay and complicate the litigation by forcing the court to investigate the record in search of reasons the zoning board could provide with minimal effort.

In any event, such investigation is usually fruitless. Attempting to discern such reasons from the statements of individual lawmakers and other participants in the review process is perilous under perfect conditions. It would be

especially problematic here. As this case shows, there is almost never a way to confirm the reason for the denial based on the transcript and minutes. Individual board members, the applicant's representatives, city employees, and members of the public often make statements leading in conflicting directions. Some statements reflect reasons for denial impermissible under the 1996 Act. Others might reflect potentially legitimate rationales if supported by substantial evidence. There is simply no way of knowing why a majority of the zoning board voted to deny the application by examining the written record. At the end of the day, then, the judge will have no choice but to guess. Without a statement of reasons from the board to guide it, the reviewing court will form its own view of why the carrier's application was denied and whether those reasons pass muster by its own lights.

The Court should find that prospect unacceptable as it would, at best, approximate the *de novo* review that the "substantial evidence" standard was designed to preclude. Section 332(c)(7)(B)(iii)'s "judicial review scheme resembles that governing many federal agency decisions." *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring). The point of deferentially reviewing federal administrative decisions is to keep courts from engaging in policymaking under the guise of judicial review. But Congress also understood that any form of deferential review depends on the agency providing reasons for its action. A "decision ... in writing" is the price for being shielded from intrusive judicial oversight. Yet the Eleventh Circuit would scrap that model and replace it with one that requires courts to exercise independent judgment and, in turn, paradoxically deprives zoning authorities of the autonomy Congress carved out for them. The Court should reverse the Eleventh Circuit's judgment.

ARGUMENT

I. The "Decision ... In Writing" Requirement Obligates The Zoning Authority To Set Forth The Reasons For Its Denial In A Document Separate From The Written Record.

The "decision ... in writing" that Section 332(c)(7)(B)(iii) requires is a document setting forth the zoning authority's rationale for denying the carrier's application. *See* Pet. Br. 18. Although "decision" has a range of ordinary meanings, it is fairly understood in this context as something more than the bare disposition that the 1996 Act refers to elsewhere as an "order" or "notification." Congress's use of the "substantial evidence" standard to govern judicial review reinforces this interpretation. A court cannot apply that deferential standard unless it knows the precise rationale for which the record evidence is intended to provide substantial support.

The Fourth Circuit's holding that merely stamping "denied" on the application constitutes a "decision ... in writing" is emblematic of the type of hyperliteralism this Court has soundly rejected. The interpretative enterprise is designed to locate the fairest reading of the specific text—not the strictest. The Eleventh Circuit's holding that the "written record" can also be the "decision ... in writing" is likewise unfaithful to the statute's text. Congress required that the zoning board produce a written "decision" *and* a "written record"—not a written "decision" *or* a "written record." The only way for the judiciary to respect that choice is by requiring the zoning authority to set forth its reasons for denial in a document separate and apart from the written record.

A. The statutory term "decision" is fairly interpreted in this context to require the state or local government to set forth the rationale for its denial of the wireless facility application.

"We begin, as always, with the text of the statute." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (citation omitted). Section 332(c)(7)(B)(iii) requires the zoning authority to produce both a "decision ... in writing ... *and* ... a ... written record" when it denies the wireless carrier's application. *Id.* (emphasis added). Congress's interjection of the conjunctive "and" between "decision" and "record" means that the former "stands independent" of the latter. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989); *see also Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1078 (2011) ("[T]he job of a coordinating junction like 'and'" is to "link[] independent ideas."); Scalia & Garner, *supra*, at 116 ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."). The statute also plainly requires that both the "decision" and "record" take written form, and that the written record contain "substantial evidence" justifying the zoning board's "decision" to deny the application.

The only disputable issue, then, is the meaning of "decision." Because the 1996 Act does not define that term, its ordinary meaning controls. *See Clark v. Rameker*, 134 S. Ct. 2242, 2245 (2014); *Taniguchi v. Kan Pac. Saipan, Ltd.* 132 S. Ct. 1997, 2002 (2012). The task of identifying the term's ordinary meaning is complicated, however, by the fact that "decision" is a "popular rather than technical or legal word" with "no fixed, legal meaning." Black's Law

Dictionary (6th ed. 1990). Sometimes a "decision" is merely the "judgment" a court issues; in other circumstances a "decision" is the "opinion of the court" or "the reasons given for the judgment." *Id.*; *see also* Black's Law Dictionary (7th ed. 1999) (cross-referencing the definition of "opinion"). When, as here, a term can carry a range of meanings, the interpretative process is guided by the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also Graham Cnty Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005) ("Statutory language has meaning only in context.").

In this context, the term "decision" requires the zoning authority to set forth the reasons for denying the wireless carrier's application. *See* Pet. Br. 24-25. "[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi*, 132 S. Ct. at 2004-05 (citation and quotations omitted); *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning") (citation omitted); *see, e.g., Dep't of Revenue of Oregon v. ACF Indus., Inc.* 510 U.S. 332, 342 (1994). The way Congress used the term elsewhere in the Act indicates that Section 332(c)(7)(B)(iii) uses "decision" to mean something more than a notification or mere disposition.

Section 409, for example, establishes the procedures for Federal Communications Commission ("FCC" or

"Commission") adjudications. 47 U.S.C. § 409. After a hearing, "the person or persons conducting" the adjudication "shall prepare and file an initial, tentative, or recommended decision." *Id.* § 409(a). The parties then "file exceptions [to the decision] and memoranda in support thereof" that "shall be passed upon by the Commission." *Id.* § 409(b). In that context, "decision" must mean something more than just an unexplained disposition. Without knowing the reasons for the hearing officer's adjudication, it would be impossible for parties to contest its legal or factual basis or for the Commission to discharge its statutory duty to "pass[] upon" the decision's merit. That is why Section 409 "decisions" do not resemble bare dispositions. *See, e.g., In the Matter of Florida Cable Telecommunications Assoc., Inc.*, 26 F.C.C.R. 6452 (2011).

Section 1442 also employs the term, establishing the standard of review for an FCC "decision" disapproving a State's plan for a public safety broadband network. 47 U.S.C. § 1442(h)(2). Among other reasons, the reviewing court must overturn the "decision of the Commission" if it failed "to hear evidence pertinent and material to the decision." *Id.* § 1442(h)(2)(C). There too, "decision" must mean more than a disposition that "disapproves a plan under this subparagraph" without any explanation as to why. *Id.* § 1442(e)(3)(c)(iv). Because courts necessarily assess the materiality of "evidence in the context of the legal issues involved," *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.3d 1017, 1021 (8th Cir. 1997), a court reviewing a "decision" under Section 1442 cannot know what evidence was "pertinent and material" unless it also knows the Commission's reasons for disapproving the State's plan.

In contrast, when Congress wants to indicate that it is referring only to the bare disposition, it knows how to do so. Section 402, for example, provides that "[a]ppeals may be taken from decisions *and* orders" of the FCC. 47 U.S.C. § 402(b) (emphasis added); *id.* § 402(h) ("In the event that the court shall render a *decision* and enter an *order* reversing the order of the Commission, it shall remand the case.") (emphasis added). In other places, the Act uses the term "notify" to signal that only a bare disposition is required. *See* Pet. Br. 24-25. This dichotomy—between "orders" and "notices" on the one hand, and "decisions" on the other—pervades the Act. *See e.g.* 47 U.S.C. § 405(a) ("After an order, decision, report, or action has been made ...."); *id.* § 413 ("[A]ll notices and process and all orders, decisions, and requirements of the Commission.").

The distinction the Act draws in those other sections must inform the interpretation of Section 332(c)(7)(B)(iii). The Court "generally seek[s] to respect Congress' decision to use different terms to describe different categories of people or things." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). If a document, for instance, says "*land* in one place and *real estate* later, the second provision presumably includes improvements as well as raw land" even if you *could* interpret the terms interchangeably. Scalia & Garner, *supra*, at 170. The presumption must be that "the different term denotes a different idea." *Id.*

Here, the terms can have independent meaning by interpreting "decision" in Section 332(c)(7)(B)(iii) to mean a document setting forth the rationale. Doing so respects

Congress's decision, reflected in various other provisions of the Act, to use "order" or "notify" to presumptively signal that only a bare disposition is required. Though the Act does not define "order," the Administrative Procedure Act defines it as "the whole or a part of a final disposition." 5 U.S.C. § 551(6); *see also* Black's Law Dictionary (6th ed. 1990) (defining "order' as "[d]irection of a court or judge made or entered in writing ... which determines some point or directs some step in the proceedings."). Respondent is thus quite wrong to contend that the Act always specifies through additional language when a "decision" means a document setting forth an "explanation of the bases or reasons for a denial." Brief in Opposition 26. In fact, Section 155 provides that in "passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications *without specifying any reasons thereof*." *Id.* (emphasis added). Section 155 alone defeats Respondent's argument that the Act *never* requires a decision to include a rationale absent specific language to that effect.

To be sure, at least one of the Act's provisions goes out of its way to make clear that the decision must provide the reasons for the disposition. *See* 47 U.S.C. § 546(c)(3) ("[T]he franchising authority shall issue a written decision .... Such decision shall state the reasons therefor."). But Section 546 just reflects that Congress sometimes employs the "lamentably common belt-and-suspenders approach," Scalia & Garner, *supra*, at 177, when "decision" already transmitted that intention. The fact that Congress did so, however, is not a basis for distorting the term's ordinary meaning throughout the rest of the Act, especially as the statute tends to use the term "order" or "notify" when referring to the bare disposition.

At bottom, "only the most compelling evidence could persuade" the Court "that Congress intended ... nearly identical language of ... two provisions to have different meanings." *CWA v. Beck*, 487 U.S. 735, 754 (1988); *see also Finnegan v. Leu*, 456 U.S. 431, 438 (1982) ("Certainly one would expect that if Congress had intended identical language to have substantially different meanings in different sections of the same enactment it would have manifested its intention in some concrete fashion."). There is no such compelling or concrete evidence here. Thus, the Court should interpret "decision" as used in Section 332(c) consistent with its use elsewhere in the Act, *viz.*, to mean a document setting forth the reasons for the disposition—not just the disposition itself.

Any doubt as to the ordinary meaning of "decision" is put to rest by its affiliation in Section 332(c)(7)(B)(iii) with that provision's "substantial evidence" standard. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (2013) ("Words that can have more than one meaning are given content ... by their surroundings."). Congress's use of the "substantial evidence" standard as the yardstick for evaluating the legality of the zoning board's decision signaled incorporation of "the traditional standard used for judicial review of agency actions." H.R. Rep. No. 104-458, at 209 (1996) (Conf. Rep.); *see also Rancho Palos*, 544 U.S. at 129 (Breyer, J., concurring); Pet. Br. 17-18. That standard requires the court to ensure that the decision is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

But before the court could decide whether there is relevant evidence supporting that conclusion, it of course would need to know *why* the board denied the application. Pet. Br. 18-20. That is precisely why the statute "requires local zoning boards ... [to] give reasons for denials 'in writing.'" *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring). In other words, "[t]he requirement that agency action be supported by substantial evidence presupposes that the agency must identify reasons for its actions," Pet. Br. 18, because the system of judicial review Congress established could not function without it.

B. The unduly narrow interpretation of the "decision ... in writing" requirement the Fourth and Eleventh Circuits adopted is unsustainable.

In the name of textualism, the Fourth Circuit and Eleventh Circuit have adopted a blinkered version of Section 332(c)(7)(B)(iii) that does not square with the law's ordinary meaning. In the Fourth Circuit's view, merely stamping "'Denied' on the first page of [an] application ... fulfills the 'in writing' requirement of § 332(c)(7)(B)(iii)." *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312 (4th Cir. 1999); *see also City Council of City of Virginia Beach*, 155 F.3d at 429 (same). But in its haste to "quickly dispose" of this question, *id.*, the court mistook "'strict constructionism'—a hyperliteral brand of textualism"—for proper statutory interpretation. Scalia & Garner, *supra*, at 355.

"Strict constructionism understood as a judicial straightjacket is a long-outmoded approach deriving from a mistrust of all enacted law." *Id.* That is because

"a sterile literalism ... loses sight of the forest for the trees." *N.Y. Trust Co. v. Commissioner*, 68 F.2d 19, 20 (2d Cir. 1933) (L. Hand, J.); *see also Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946) ("Literalness may strangle meaning."). "Adhering to the *fair meaning* of the text," in contrast, "does not limit one to the hyperliteral meaning of each word in the text" because "[t]he full body of a text contains implications that can alter the literal meaning of individual words." Scalia & Garner, *supra*, at 356; *see also Ranchos Palos Verdes*, 544 U.S. at 127 (Breyer, J., concurring) ("[C]ontext, not just literal text, will often lead a court to Congress' intent in respect to a particular statute"). "The words" of any legal text, in sum, "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816).

The Fourth Circuit's strict construction of "decision ... in writing" illustrates the hazard of an interpretation that ignores the full statutory context and structure. Under such an approach, the board could consummate its "decision" with an "X" on the wireless carrier's application, or even respond to the application in a different language. Either would literally convey the disposition "in writing." As the Eleventh Circuit rhetorically asked in defense of the Fourth Circuit's approach: "After all, everyone knows what 'in' means and everyone knows what 'writing' means. How much simpler and clearer could the statutory language be?" *City of Milton*, 728 F.3d at 1277. Both courts forgot, however, that statutory interpretation is not a contest in which the first one to dream up the narrowest formulation of the text is crowned champion textualist. The goal is to identify the *fairest* reading of the specific statutory text in light of its context and structure—not the *narrowest*.

The Fourth Circuit's crabbed interpretation of the "decision ... in writing" requirement does not capture the fair meaning of the provision in light of the statute's context and structure. Had Congress envisioned a regime in which the zoning authority could simply issue an unexplained order rejecting the application, it could have just required "a written denial." Its deliberate use of the more elaborate phrase "a decision ... to deny ... in writing" naturally implies that the "decision" be something more than a bare disposition. Fairly read, the written decision that Section 332(c)(7)(B)(iii) requires must set forth the reasons for the denial to facilitate the expedited judicial review the statute promises.

The Eleventh Circuit's approach fares no better. After expressing sympathy for the Fourth Circuit's unduly narrow interpretation, it held that "*to the extent* that the decision must contain grounds or reasons or explanations," they need not be provided in a separate document; rather, it was enough that the reasons could be found in the hearing transcripts and minutes. *City of Milton*, 728 F.3d at 1285 (emphasis added); *see also* Pet. App. 13a ("All of the written documents should be considered collectively in deciding if the decision, *whatever it must include*, is in writing.") (emphasis added). Accordingly, the Eleventh Circuit has, at least for now, accepted that "there must be [written] reasons for the denial" because, "otherwise, there would be nothing for substantial evidence to support." *Milton*, 728 F.2d at 1283.

But the Eleventh Circuit's conclusion that those reasons nonetheless "can be gleaned from the denial itself *or* from the written record" does violence to the statutory text. *Id.* (emphasis added). As explained above, Section

332(c)(7)(B)(iii) uses the conjunctive "and" instead of the disjunctive "or." *See supra* at 8; *see also* Pet. Br. 27. Section 332(c)(7)(B)(iii) thus speaks of both a "decision in writing" *and* a "written record." The two are not the same, and, as a result, the "decision ... in writing" cannot also be the "written record." *See Todd*, 244 F.3d at 59-60 ("The [1996 Act] distinguishes between a written denial and a written record, thus indicating that the record cannot be a substitute for a separate denial.").

The Eleventh Circuit's reminder "that we are a country of laws, not one ruled by the musings, whether pragmatic or otherwise, of the black-robed class" is well taken. *Milton*, 728 F.3d at 1285. But "to subtract" words from the law is no more appropriate than to "add" them; the judicial task is "neither to delete nor to distort." *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951). In admonishing that "the words of Congress" must be taken "defects and all," *Milton*, 728 F.3d at 1284, the court thus committed the very error it warned against. Congress's call for a "decision ... in writing" *and* a "written record" must be respected. Yet the Eleventh Circuit would refashion the law to permit the written record to act as substitute for a separate written decision. Whether state and local boards should be required to offer the reasons for their decisions *and* produce a written record was a battle "fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

It is certainly true, then, that the "actions of [zoning authorities] should be judged based on the rules of the

game that were written into the Act when it acted." *Milton*, 728 F.3d at 1285. But the Eleventh Circuit missed that the 1996 Act's "rules" are a deliberate tradeoff between state and local autonomy and acceleration of wireless infrastructure deployment. The zoning authority's denial of the carrier's application is due deference under the "substantial evidence" standard. But it must set forth the reasons for denying the application in a document separate from the written record to facilitate expedited judicial review. The Eleventh Circuit's myopic focus on "in writing," at the expense of the rest the provision, reduces the "decision ... in writing" requirement to a hollow formality. It should be rejected.

II. A Meaningless "Decision ... In Writing" Requirement Will Frustrate Judicial Review, Undermine Congress's Purposes, and Hamper Economic Growth.

Respondent's assertion that a court must search the written record to identify those reasons is not only legally unfounded, it is impracticable, unwise, and at odds with Congress's purposes. Forcing judges to dig through the written record to uncover the zoning authority's reasons for denying the application will turn an already long review process into an interminable one. The additional delay will be costly. Congress passed Section 332(c)(7) to accelerate infrastructure deployment that was being inhibited by abuses at the state and local level. Undermining that mission will cause substantial harm to the national economy.

The exercise also is pointless. It usually will be impossible to determine from the record the basis for the

zoning authority's decision. At the end of the day, courts will be left to guess at what motivated the board to deny the carrier's application. Judicial oversight designed to ensure the zoning authority's denial under state law was "supported by substantial evidence," as a result, will devolve into *de novo* review. But that type of independent review is not what Congress wanted when the siting denial is grounded in otherwise permissible state-law bases. It thrusts courts into precisely the kind of policymaking role that is beyond the judicial ken. The Court can avoid this problem by requiring the zoning board—not the court—to identify the reasons for the denial in a document separate from the record.

A. Forcing courts to scour the written record to discern the zoning authority's rationale will deter wireless deployment and harm the economy.

Congress has long understood that wireless carriers face significant hurdles in securing approval for tower locations. They must enter into private arrangements with landowners, comply with the rules for environmental review under the National Environmental Policy Act of 1969 and the National Historic Preservation Act of 1966, and, of course, obtain local zoning approval. *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 28 F.C.C.R. 14238, 14239 (2013) ("*Wireless Facilities Siting NPRM*"). Before the 1996 Act, zoning authorities had "created an inconsistent and, at times, conflicting patchwork of requirements which [] inhibit[ed] the deployment" of wireless networks. H.R. Rep. No. 104-204(I), at 94 (1995); *see also* Pet. Br. 2-3.

The 1996 Act was designed to curb these abuses. *See id.* 3, 30-31; *supra* at 2-3. But while Section 332(c) "requires state and local zoning authorities to take prompt action on siting applications for wireless facilities[,] ... in practice, wireless providers often faced long delays." *City of Arlington*, 133 S. Ct. at 1867. In the face of continued local obstacles since the 1996 Act's passage, both Congress and the FCC have taken additional steps to accelerate this process. The Middle Class Tax Relief and Job Creation Act of 2012 requires that localities approve all modifications to existing wireless towers that do not change the physical dimensions of those towers. *See* 47 U.S.C. § 1455(a). The FCC established presumptive timeframes for state and local zoning boards to process tower siting requests in the 2009 *Shot Clock Order* upheld in *City of Arlington*. *See supra* at 2 n.2.

Ensuring timely disposition from zoning authorities has only partially solved the problem. A rejected siting applicant's path to judicial resolution has proven no less arduous. As this dispute shows, cases can take years to resolve once litigation ensues. T-Mobile filed the complaint in this case on May 13, 2010; the district court entered judgment on March 27, 2012. Pet. App. 35a. Nearly two years of litigation in the district court is not resolution "on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). Yet many disputes take even longer to adjudicate. *See, e.g., Sprint Spectrum L.P. v. Paramus, N.J.*, 2:09-cv-4940-KM-MAH (D.N.J.) (56 months); *BellSouth Mobility, Inc. v. Miami-Dade Cnty.*, 1:98-cv-2724-AJ (S.D. Fla.) (28 months). And these lengthy timeframes do not take into account the inevitable appeal.

The Eleventh Circuit's approach would make this already long process even longer. Before a district court could evaluate whether the zoning authority's denial was supported by substantial evidence—the task assigned to it by Congress—it would first need to figure out why the board denied the carrier's application. *See* Pet. Br. 29. To do that, the court would need to root through the written record to divine the basis for the denial since the board would be under no legal obligation to separately provide its reasons. *See supra* at 14-18. Even if this were feasible, *but see infra* at 24-28, it is an onerous task that would expand the scope of the siting dispute, burden the district court, and substantially delay the proceeding.

For example, the written record here included over 750 pages of documents and a 108-page transcript of witnesses from T-Mobile, Council members, city officials, and city residents. JA 92a-277a; *T-Mobile South, LLC v. City of Roswell, Ga.*, 1:10-cv-01464-AT (N.D. Ga.) (Doc. Nos. 32-102, 106-17). A sizable record is not uncommon. *See, e.g., Indus. Commc'ns & Elecs., Inc. v. Town of Alton*, 07-CV-082-JL, 2012 WL 4343759, at *2 (D.N.H. Sept. 21, 2012) (2300 pages); *Sprint Spectrum L.P. v. Parish of Plaquemines*, CIV.A. 01-0520, 2003 WL 193456, at *1 (E.D. La. Jan. 28, 2003) (775 pages). District courts and carriers should not have to carry the heavy burden of pouring through these documents in search of a rationale because the zoning authority has been excused of fulfilling its duty to separately set forth its reasons for denying the application. Congress wisely charged the party with first-hand access to this information with the legal obligation to provide it.

Notably, this is not just typical wrangling between opponents seeking to gain a litigation advantage. Congress and the FCC have intervened in order to "expand wireless services and increase competition among those providers." *Todd*, 244 F.3d at 57. There is every reason for concern that protracted litigation will force wireless carriers to devote resources to fighting zoning authorities that should be allocated to infrastructure deployment. Carriers facing the prospect of prolonged litigation may even decide the cost is too great and restart the zoning process instead. Worse still, carriers may be forced to altogether abandon efforts to fill gaps in their network in those regions of the country where local resistance is greatest. Regardless of which unappealing path the wireless carrier chooses, the inevitable result of the Eleventh Circuit's "anywhere in the record" rule is to encourage zoning authorities to obscure the rationale for the denial in the hope that carriers will find the prospect of fighting them too daunting. The potential for gamesmanship is especially acute given that the statute does not impose a deadline on when the record must be made available to the wireless carrier; indeed, nothing prevents a zoning board from waiting until after Section 332(c)(7)(B)(v)'s 30-day limitations period has run to release the record. *See* Pet. Br. 9, 28-29

The economic consequences of all this bureaucratic gamesmanship are quite troubling. The wireless industry has been a significant driver of economic growth and job creation. *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act*, Sixteenth Report, 28 F.C.C.R. 3700, 3929-30 (2013) ("*Sixteenth Report*"). The numbers are staggering. The industry invested over $25 billion in wireless infrastructure in 2011 alone, with a total of $223 billion invested over the

previous decade. *See* CTIA, *The U.S. Wireless Industry Overview*, Apr. 25, 2012, at 7, *available at* http://files.ctia.org/pdf/042412_-_Wireless_Industry_Overview.pdf ("*CTIA Study*"). That same year, the industry generated over $195.5 billion in global economic activity, with $146.2 billion being retained domestically. Roger Entner, *The Wireless Industry: The Essential Engine of US Economic Growth, Recon Analytics*, May 2012, at 1, *available at* http://reconanalytics.com/wp-content/uploads/2012/04/Wireless-The-Ubiquitous-Engine-by-Recon-Analytics-1.pdf ("*Recon Report*"). This was all while the wireless industry directly or indirectly employed more than 3.8 million Americans, accounting for 2.6% of *all* U.S. employment. *Id.*

Moreover, every sector of the economy has a vested interest in accelerating wireless deployment. Access to cutting-edge technology "improve[s] productivity for firms in other industries." *Sixteenth Report*, 28 F.C.C.R. at 3929-30. Improving wireless networks lowers transaction costs for businesses; and with an advanced digital infrastructure, "employees and firms in all sectors are able to communicate more quickly ... thereby enabling them to anticipate and respond to changes and variations in consumer demand faster and at a lower cost." *Id.* at 3930. Consumers realize substantial benefits too as they are able to "more efficiently gather information on goods, services, and employment opportunities." *Id.* at 3931.

Overall, the industry "accounted for $33 billion in productivity gains for U.S. businesses in 2011." *Recon Report* at 4. Another $1.4 trillion in productivity gains is expected over the next decade. *Id.* It is little wonder, then, that President Obama called for the rapid deployment of

"the next generation of high-speed wireless coverage to 98 percent of all Americans" in his 2011 State of the Union address. *See* White House, *State of the Union Address* (Jan. 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address. Such progress will "make America a better place to do business and create jobs." *Id.*

In sum, business and consumer demand for wireless services is only increasing, *see* Pet. Br. 5-6, and the "ability of wireless providers to meet this demand will depend ... on the extent to which they can deploy new and improved wireless facilities." *Wireless Facilities Siting NPRM*, 28 F.C.C.R at 14239. The Eleventh Circuit's approach, which undercuts the industry's ability to meet this growing demand, thus will have real economic consequences. In simple terms, every $1 invested in wireless infrastructure creates an additional $7-$10 of GDP. *See CTIA Study* 6. With each cell tower costing on average $250,000-$300,000 to construct, *see Sixteenth Report*, 28 F.C.C.R. at 3909, the economy suffers up to $3 million in lost GDP every time a carrier abandons a tower siting because of local resistance. The Court should reject any interpretation of Section 332(c)(7)(B)(iii) so evidently at odds with the 1996 Act's purpose and design.

B. Scouring the written record in order to divine the zoning authority's rationale is a fruitless exercise that will force judges to guess at a disposition's basis.

Interpreting the statute to require courts to scour the written record in search of a rationale is not only at odds with Congress's desire for streamlined review, it

is unrealistic. Because the zoning authority is usually a multiple-member body, individual statements regarding one member's reasons for his or her vote provides limited insight into the reasons for the board's denial. "Individuals in general and lawmakers in particular frequently act for a variety of reasons." *Pers. Adm'r of Mass. v. Feeney* 442 U.S. 256, 282 (1979). "Every legislat*or* has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislat*ure* is a collective body that does not have a mind; it 'intends' only that the text be adopted, and statutory texts usually are compromises that match no one's first preference." Frank H. Easterbrook, foreword to Reading Law, *supra*.

In other words, "[w]hat motivates one legislator to make a speech ... is not necessarily what motivates scores of others" to cast their vote. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). A court reviewing the written record to discern the basis for the zoning authority's denial thus confronts a nearly insuperable task "when that record reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board," *Todd*, 244 F.3d at 60; *cf. Rust v. Sullivan*, 500 U.S. 173, 185 (1991) ("The parties' attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing.").

This case exemplifies the problem. *See* Pet. Br. 7-8, 37-38. The district court explained that the six council members' comments at the hearing "reflect[] a number of different reasons that may have motivated individual Council members to vote to deny T-Mobile's application." Pet. App. 30a. As a result, it was "impossible for the Court

to discern which of these reasons motivated the Council as a whole or commanded the support of a majority of the Council members." *Id.* Indeed, neither in *Milton* nor in this case could the Eleventh Circuit identify the reasons for the denial that were supposedly contained within the written record. *See* Pet. Br. 39-40.

But this is not the worst-case scenario. Other cases involve records that may not include even individual board members' justifications. *See id.* 12 n.2. Such cases would leave the court with almost nothing to work with because zoning records generally contain "a substantial volume of conflicting evidence on a number of different issues, including," in this case, "the aesthetics of the proposed tower, its impact on property values, and whether it is needed for [T-Mobile] to provide reliable service." Pet. App. 31a. Contradictory evidence forces a court to guess as to what "the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why." *Id.* 32a. Absent overwhelming evidence pointing to a single justification for the siting denial, a record that will inevitably contain contradictory information (if it contains probative information at all) will not reveal the reasoning for the board's action.

This makes it nearly impossible to enforce Section 332(c)(7)'s substantive prohibitions. Zoning authorities cannot discriminate against certain carriers and they cannot effectively prohibit wireless coverage over certain areas. 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II). Yet at least one Council member in this case appeared to rely on precisely these reasons for denying T-Mobile's proposal, stating that "other carriers apparently have sufficient coverage in this area," Pet. App. 7a-8a, which plainly discriminates against

T-Mobile in favor of other providers, *Shot Clock Order*, 24 F.C.C.R. at 14016 (prohibiting zoning authorities from denying a tower siting application "solely because one or more carriers serve a given geographic market."). That same Council member also stated his view that towers should never be allowed in residential areas, JA 174a ("Bottom line here, I just don't think it's appropriate for residentially zoned properties to have the cell towers in their location."), which at the very least would "have the effect of prohibiting the provision of personal wireless services," 47 U.S.C. § 332(c)(7)(B)(i)(II).

Further, although the 1996 Act prohibits zoning boards from basing action on potential health effects from FCC compliant facilities, *see id.* § 332(c)(7)(B)(iv), the issue is often raised at siting hearings. Here, for example, four participants spoke against the tower location because of health risks they perceived would arise if the tower were placed in a residential area. JA 125a, 148a, 153a, 156a-158a, 331a. In fact, one participant received applause after stating: "I'm deeply concerned because I do not want my children or the children of anyone else to grow up less than 300 feet from a cell-phone tower. I've been told that there are no negative health effects from cell towers .... I ask you tonight, is it right that a family should have to raise its children less than 300 feet from a cell-phone tower? Does that feel right to you?" *Id.* 153a-154a.

This kind of opaque record puts the reviewing court in an untenable position. The zoning authority has not provided the rationale for its disposition in a separate document. The transcript refers to considerations that the 1996 Act prohibits. Yet it also refers to considerations that might provide a lawful state-law basis for denying

T-Mobile's application, but only if supported by substantial evidence. Pet. Br. 39 (citing Pet. App. 31a). The court is therefore forced to guess at what in fact served as the determining factor based on individual statements of board members and various comments from the public. The Eleventh Circuit may have no problem with this kind of approach. But "the stakes are sufficiently high" here that the Court should "eschew guesswork" altogether. *O'Brien*, 391 U.S. at 384.

Put simply, the regime approved by the Fourth and Eleventh Circuits does not even remotely resemble the substantial-evidence review Congress envisioned in Section 332(c)(7)(B)(iii).[3] Without guidance, however, courts must "read the record, speculate upon portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision

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3. As discussed above, a zoning board's denial of an application that is based on otherwise permissible state-law grounds will be upheld against a wireless carrier's challenge so long as it is supported by substantial evidence in the written record. That is distinguishable, however, from a circumstance in which the wireless carrier claims that the denial violates the substantive restrictions of Section 332, such as by considering "the environmental effects of radio frequency emissions." 47 U.S.C. § 332(c)(7)(B)(iv), by "unreasonably discriminat[ing] among providers of functionally equivalent services," *id.* § 332(c)(7)(B)(i)(I), or by "prohibit[ing] ... the provision of personal wireless services," *id.* § 332(c)(7)(B)(i)(II). That type of challenge, which turns on the zoning board's compliance with federal law and not the quality of the evidence in the written record, is reviewed *de novo*. *See T-Mobile Northeast LLC v. Loudoun County Bd. of Sup'rs*, 748 F.3d 185, 192 (4th Cir. 2014); *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 629 (1st Cir. 2002).

thus arrived at should be sustained." *Topanga Assn. for a Scenic Cmty. v. Cnty. of Los Angeles*, 11 Cal. 3d 506, 517 n.15 (1974); *Fields v. Kodiak City Council*, 628 P.2d 927, 934 (Alaska 1981) (same); *Ocean Hideaway Condo. Ass'n v. Boardwalk Plaza Venture*, 515 A.2d 485, 490-91 (Md. Ct. Spec. App. 1986) (same). In other words, instead of evaluating whether "substantial evidence" supports the zoning authority's permissible state-law basis for denying the carrier's application, the district court would be forced to conduct what is essentially *de novo* review.

The Court should find that unacceptable. *De novo* review in no way approximates the federal administrative regime upon which the "substantial evidence" standard in Section 332 is modeled. *See supra* at 13-14. "Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.'" *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 444 (1965) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Zoning denials cannot be defended based on judicial guesswork as to what might have motivated the board under any sensible system of review. Indeed, forcing the district court to construct its own reasons as to why the zoning authority denied the carrier's application would circumvent the ban on post-hoc rationalizations. *See* Pet. Br. 29.

Adopting the Eleventh Circuit's rule would in fact have the paradoxical consequence of undermining the local autonomy Congress sought to preserve. *See Milton*, 728 F.3d at 1283; Pet. Br. 36 n.6. When an agency's reasoning cannot "reasonably be discerned," a court determined to forge ahead will "substitute its judgment for that of the

agency." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). *Chevron* deference itself arose from the recognition that courts relying on their own judgment, instead of deferring to agencies, will inevitably legislate. Before *Chevron*, federal courts could "impose [their] own construction of the statute," which in turn "conferred vast policymaking power on judges who are not part of either political branch of government." Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2233, 2234 (1997). The Court thus recognized that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984). Deference ensures the responsibility "for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones" and resides where it should: with the politically accountable bodies. *Id.*

But deferential review for "substantial evidence" is predicated on the agency upholding its end of the bargain. Deference neither can be required nor properly exercised if the agency does not itself explain the reasons for its determination. *See Fox Tel. Station, Inc.*, 556 U.S. at 513 (explaining that "we insist that an agency examine the relevant data and *articulate a satisfactory explanation for its action*") (emphasis added). Thus, a "reviewing court should not attempt itself to make up for the [agency's deficiencies]: '[Courts] may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Motor Vehicle Mfrs. Assoc. of United States, Inc. v. State Farm Mut. Ins., Co.*, 463 U.S. 29, 43 (1983) (quoting *Chenery*, 332 U.S. at 196); *see also Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. United*

States, 735 F.2d 1525, 1531 (D.C. Cir. 1984) ("[We] have neither the expertise nor the authority to substitute our judgment for that of the agency and provide an explanation where the agency's path is entirely uncharted.").

To ensure that state and local governments receive the deference that Section 332(c)(7)(B)(iii) affords them, the Court must require Respondent to provide the reasons for its denial in a manner that allows the court to perform "substantial evidence" review. That is not to suggest that the 1996 Act requires a decision with the level of detail often needed to survive judicial review under the APA or *Chevron*. Nor does the statute require formal findings of fact and conclusions of law. *See City Council of City of Virginia Beach*, 155 F.3d at 429-30. But there must be a separate written decision that "describe[s] the reasons for the denial ... to allow a reviewing court to evaluate the evidence in the record that supports those reasons." *New Par v. City of Saginaw*, 301 F.3d 390, 396 (6th Cir. 2002). Where there is a single basis for denial, that description may be brief. Where there is conflicting evidence, more may be required. But such a description is essential in every case if the courts are to conduct the review that Section 332(c)(7)(B)(iii) requires.

CONCLUSION

For the forgoing reasons, and for those in the Petitioner's opening brief, the Court should reverse the Eleventh Circuit's judgment.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF COMPETITIVE CARRIERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In order to promote the prompt deployment of telecommunications facilities and to enable expedited judicial review, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any decision by a state or local government denying a request to place, construct, or modify a personal wireless service facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. §332(c)(7)(B)(iii).

The question presented is whether a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory "in writing" requirement.

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INTEREST OF *AMICUS CURIAE*[1]

Competitive Carriers Association ("CCA" or "Association"), founded in 1992 by rural and regional wireless carriers (and previously known as the Rural Cellular Association), is the nation's leading organization of competitive wireless providers and stakeholders. CCA's carrier members attempt to compete with the nation's two largest "incumbent" wireless carriers, AT&T and Verizon. The licensed service area of the Association's more than 100 wireless carriers covers 95 percent of the United States. Its members depend on cell towers and other cell sites permitted by state and local authorities consistent with the Telecommunications Act of 1996. Headquartered in Washington, D.C., the Association advocates on behalf of its members and works to educate policymakers on key issues that affect its members' ability to compete and thrive.

The Association files briefs as *amicus curiae* in cases presenting issues of importance to the wireless industry. *E.g.*, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013). It also regularly advocates before Congress, the Federal Communications Commission, and the Administration (including the Office of Science and Technology Policy, the National Telecom-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of this Court.

munications and Information Administration, and other agencies) to ensure that its members' voices and views are heard not only by policymakers, but also by the media and the general public.

The Association fully supported Congress's enactment of what is now Section 332(c)(7) of the Communications Act of 1934 (as amended by the Telecommunications Act of 1996), the statutory provision in question.

The Association and its members have multiple interests in this case. Carriers must obtain wireless siting approval from state and local authorities before building or improving cell sites, including sites in underserved rural areas. CCA members seek approvals more frequently than the "incumbent" providers because they presently hold a disproportionately small amount of low-frequency spectrum. The Association has a vital interest in ensuring that the approval process is fair, reasonable, timely, and transparent, as an opaque decision-making process impairs its members' ability to address the concerns of state and local authorities or challenge siting denials.

The Eleventh Circuit's interpretation of the "in writing" requirement of Section 332(c)(7)(B)(iii) threatens to weaken competition by impeding the efforts of the Association's members to expand access to underserved areas and compete with the two largest wireless carriers. Given its longstanding commitment to a vibrantly competitive wireless industry, the Association appeared as sole *amicus curiae* on behalf of Petitioner requesting that certiorari be granted in this case, and now appears once again as *amicus curiae* on Petitioner's behalf to urge the Court to reverse the Eleventh Circuit's decision.

SUMMARY OF ARGUMENT

For nearly twenty years, Congress has made the rapid deployment of advanced telecommunications technology a national imperative. Congress enacted the Telecommunications Act of 1996 (the "Act") to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 104 Pub. L. No. 104, 110 Stat. 56, Preamble. Congress reaffirmed these goals in the Broadband Data Improvement Act of 2008 (the "Broadband Act"), which seeks to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," "promote competition in the local telecommunications market," and "remove barriers to infrastructure investment." 47 U.S.C. §1302(a).

In many ways, the wireless industry has made great strides in fulfilling Congress's mission. As this Court recently noted, "modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. ___, slip op. at 9 (June 25, 2014). "[A] significant majority of American adults now own" a smart phone, a technology which was "unheard of ten years ago." *Id.* The mass proliferation of broadband services has made the wireless industry a key player in the national economy.

Congress has recognized that the nation benefits substantially from rapid deployment of technological advancements. "The deployment and adoption of

broadband technology has resulted in enhanced economic development and public safety for communities across the nation, improved health care and educational opportunities, and a better quality of life for all Americans." 47 U.S.C. §1301(1).

However, the benefits of these new technologies are not shared equally by all Americans. In rural parts of the country, the lack of choice among providers is stark. While 92.4% of non-rural Americans were covered by four or more mobile broadband service providers as of October 2012, only 37.4% of rural Americans had access to a similar amount of choice. As a result, rural Americans in particular suffer from diminished service and increased costs when competition is impaired. Closing the "broadband availability gap" which affects millions of Americans – particularly those in rural areas – remains the nation's great infrastructure challenge of the 21st century.

The Act includes many provisions, particularly those governing permit applications for siting (*i.e.*, building or modifying) wireless facilities, that reflect Congress's effort to increase competition and reduce unnecessary regulation by state and local governments that impedes the expansion of wireless services. This case is indicative of the problems Congress was acting to resolve.

Section 332(c)(7)(B)(iii) of the Act requires that a state or local government's denial of a service provider's application for siting wireless facilities be "in writing." The First, Sixth, Seventh, and Ninth Circuits have held that Section 332(c)(7)(B)(iii) requires

authorities to explain in writing their reasons for denying applications.[2] The Eleventh Circuit in this case, and the Fourth Circuit before it, on the other hand, have held that a local government satisfies its obligations under Section 332(c)(7)(B)(iii) simply by issuing a written decision that a siting application is "denied."[3]

The minority interpretation of the "in writing" requirement is contrary to the plain language, structure, and legislative history of the statutory provision. It also conflicts with the standard of review contemplated by Congress when it passed the Act and the analogous, long-standing method of judicial review of agency action, pre-dating the Administrative Procedures Act ("APA"). Finally, it is contrary to the Act's purpose of spurring development of the nation's critical telecommunications infrastructure through increased competition and decreased regulation.

CCA's members and the citizens they serve have an interest in a review process that is as transparent, cost-effective, and streamlined as possible. The majority rule fosters such a process. The minority rule, on the other hand, leads to at least two undesirable

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[2] *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 723 (9th Cir. 2005); *Helcher v. Dearborn Cty.*, 595 F.3d 710, 719 (7th Cir. 2010).

[3] *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-13 (4th Cir. 1999); *T-Mobile South, LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1220-21 (11th Cir. 2013).

outcomes that disproportionately affect the Association and its members.

First, the minority rule generates costly and drawn-out litigation that interferes with growth and competition in the wireless service industry. As competitors to the "incumbent" wireless providers (AT&T and Verizon), CCA's carrier members (typically smaller, newer, rural or regional providers) often require more approvals to build or upgrade their networks than the "incumbent" providers, and therefore are impacted disproportionately by impediments created by the siting application review process.

Second, the minority rule has a disproportionate impact on rural communities and communities of color, both of which rely more heavily on mobile wireless broadband to access the Internet than "wired" access.

For these reasons, *amicus* urges this Court to rule that Section 332(c)(7)(B)(iii)'s "in writing" requirement obligates a state or local governmental body to explain its reasons for denying a service provider's application for siting wireless facilities in the written denial of the application.

ARGUMENT

I. Congress and the Executive Branch Agree That Increased Competition Is Key To Improving Access To Wireless Technology.

In the last two decades, both Congress and the Executive Branch have strongly supported the development and deployment of advanced telecommunications technology as a means of promoting economic growth and improving the lives of individual Americans. In 1996, Congress enacted the Telecommunications Act to "secure lower prices and higher quality

services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 104 Pub. L. No. 104, Preamble.

Congress sought to achieve these goals by "promot[ing] competition and reduc[ing] regulation." *Id.*; *see also* H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (Act's goal is "to provide a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private-sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."). Through the Act, this Court has recognized, Congress "fundamentally restructure[d]" telephone markets; "ended the longstanding regime of state-sanctioned monopolies," encouraged "competition among multiple provide :," and prohibited state laws that "impede competition." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-72 (1999).

Congress acknowledged the positive contributions the wireless communications industry has made, both to the nation and in the lives of individual Americans since the Act's passage, when it enacted the Broadband Data Improvement Act of 2008. 47 U.S.C. §1301(1) ("[t]he deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the nation, improved health care and educational opportunities, and a better quality of life for all Americans.").

Congress also confirmed that developing the nation's telecommunications infrastructure remains "vital" to the nation's future. *Id.*, §1301(2) ("deployment

and adoption of broadband technology is vital to ensuring that our nation remains competitive and continues to create business and job growth."). The Broadband Act was designed to "promote competition" and "remove barriers to infrastructure investment" to ensure "the deployment on a reasonable and timely basis of advanced telecommunications capability to ***all*** Americans." *Id.*, §1302(a) (emphasis added).

President Obama has likewise stressed that improved access to broadband "is essential to the Nation's global competitiveness in the 21st century, driving job creation, promoting innovation, and expanding markets for American businesses." Exec. Order No. 13616, 77 Fed. Reg. 36903 (June 14, 2012) ["Accelerating Broadband Infrastructure Deployment"].[4] According to the White House, "[e]nsuring America has 21st century digital infrastructure," including "high-speed broadband Internet access" and "fourth-generation (4G) wireless networks" is "critical to our long-term prosperity and competitiveness."[5] The President has vowed to "make it possible for businesses to deploy the next generation of high-speed wireless coverage to 98 percent of all Americans" by 2016.[6]

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[4] *Available at* http://www.gpo.gov/fdsys/pkg/DCPD-201200474/pdf/DCPD-201200474.pdf.

[5] The White House, *Technology*, *available at* http://www.whitehouse.gov/issues/technology#.

[6] The White House, Office of the Press Secretary, "Remarks by the President in State of Union Address" (Jan. 25, 2011), ***available at*** http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

The Department of Justice's Antitrust Division believes that "the best method of ensuring that consumers receive low-priced, high-quality products and services, greater choice among providers, and important innovation" in the telecommunications services industry is through "competition." *See* Ex Parte Submission of U. S. Dept. of Justice, *In re Policies Regarding Mobile Spectrum Holdings*, at 6, FCC WT Docket, No. 12-269 (Apr. 11, 2013) ("DOJ Comments");[7] *see also* CCA, "A Framework for Sustainable Competition in the Digital Age: Fostering Connectivity, Innovation, and Consumer Choice," at 18 (Dec. 4, 2013) ["CCA White Paper"][8] ("robust competition protects consumers in more dynamic and effective ways than regulation."). To that end, and in furtherance of its Congressional mandate, the FCC has worked to "reduce barriers to wireless infrastructure investment"[9] and swiftly address "unnecessary or unclear regulatory requirements and processes."[10]

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[7] *Available at* http://apps.fcc.gov/ecfs/document/view?id=7022269624; *id.* ("competitive forces have been a central driver of innovations that have enabled carriers to expand capacity and improve service quality."). One study has concluded that, without robust competition in the mobile broadband market, where it exists, consumers would pay at least ten percent higher prices, which translates conservatively to more than $20 billion annually. *See* William Lehr, Benefits of Competition in Mobile Broadband Services, at 2 (2014), *available at* http://competitivecarriers.org/advocacy/benefits-of-competition-in-mobile-broadband-services-a-study-by-william-lehr/9113652.

[8] *Available at* http://competitivecarriers.org/wp-content/uploads/2014/01/CCA_SustainableCompetition_ FINAL.pdf.

[9] FCC, *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies etc.*, Notice

II. While Competitive Carriers Strive To Meet Consumers' Mobile Demands, Competitive Challenges Remain.

a. The wireless industry has responded enthusiastically to the government's call for ubiquitous broadband services. As the FCC has noted, "tremendous efforts are being made by the private sector, the Commission, and other governmental entities to bring broadband to all Americans."[11] As a result, "Americans are now in the transition toward increasing reliance on their mobile devices for broadband services, in addition to voice services."[12] For example, as of June 2013, there were 93 million mobile broadband connections with download speeds of at least three megabits per second (Mbps) and upload

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of Proposed Rulemaking, 2013 WL 5405395, ¶ 4 (2013) ("2013 FCC NPRM").

[10] *Id.*

[11] FCC, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Ninth Broadband Progress Notice of Inquiry, 27 FCC Rcd. 10523, ¶ 3 (2012).

[12] *See also* FCC, *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd. 13994, 13995, *recon. denied*, 25 FCC Rcd 11157 (2010), ("Petition for Declaratory Ruling"), *aff'd sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013).

speeds of at least 768 kilobits per second (kbps) (as compared to only 70 million fixed connections with the same speeds).[13]

Because of its ongoing efforts to extend broadband services to all Americans, the wireless industry has become a critical player in the domestic economy, contributing "more than $150 billion in GDP annually[.]"[14] *See also* CCA White Paper, *supra*, at 5 (stating that the wireless industry contributed "$146.2 billion to the nation's GDP in 2011" alone).

Continued expansion and job growth are anticipated. The FCC has estimated that wireless broadband capital expenditures would "increase steadily" by billions of dollars between 2012 and 2015.[15] And a

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[13] FCC, Indus. Analysis & Tech. Div., Wireline Competition Bureau, *Internet Access Servs.: Status as of June 30, 2013* at 1 (June 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf.

[14] The White House, Office of the Press Secretary, "FACT SHEET: Administration Provides Another Boost to Wireless Broadband and Technological Innovation" (June 14, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/14/fact-sheet-administration-provides-another-boost-wireless-broadband-and-.

[15] FCC, Connecting America: National Broadband Plan, Ch. 4 at 40 (2010), *available at* http://www.broadband.gov/plan/ ("CONNECTING AMERICA"). Current reports of the nation's leading wireless providers' capital expenditure appear to corroborate the FCC's prior estimate. *See* Sarah Reedy, Light Reading: Networking the Telecom Community, "SDN, NFV Not Slashing Wireless Capex Yet" (March 7, 2014), *available at* http://www.lightreading.com/carrier-sdn/nfv-(network-functions-

recent study commissioned by the PCIA – The Wireless Infrastructure Association, concluded that "industry projected mobile broadband investments" will "increase GDP in 2017 by 1.6 to 2.2% ($259.1 to $355.3 billion in dollar terms) and generate up to 1.3 million net new jobs[.]"[16] Given these statistics (and provided with the right regulatory environment), the wireless industry is indisputably an "essential engine of U.S. economic growth[.]" CCA White Paper, *supra*, at 5.

b. Obstacles to achieving the goals set forth in the Act nevertheless remain. Recent findings and conclusions by the FCC about the wireless market demonstrate that the Act's goals have yet to be met, and these shortcomings adversely affect competitive carriers and the customers they serve, particularly in rural and minority communities.

Too many Americans still lack adequate access to mobile wireless broadband. Accelerating Broadband Infrastructure Deployment, 77 Fed. Reg. 36903, 36903 ("today too many areas still lack adequate access to this crucial resource [broadband services]").[17]

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virtualization)/sdn-nfv-not-slashing-wireless-capex-yet/d/d-id/708107.

[16] Alan Pearce, Richard Carlson, and Michael Pagano, "Wireless Broadband Infrastructure: A Catalyst for Job Growth 2013-2017," at 1 (2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520949634.

[17] *See also* FCC, Petition for Declaratory Ruling, *supra*, at 13995 ("Without access to mobile wireless networks, . . . consumers cannot receive voice and broadband services from providers.").

The FCC has concluded that "'advanced telecommunications capability' is not being deployed to all Americans in a reasonable and timely fashion." FCC, Ninth Broadband Progress Notice of Inquiry, *supra*, at ¶ 3.

Lack of competition among carriers also persists and has significantly impaired Americans' access to speeds and prices compared to other developed countries. *See* CONNECTING AMERICA, *supra*, at 36. In particular, a substantial disparity exists between the number of mobile broadband service providers in urban versus rural parts of the country. While 92.4% of non-rural Americans were covered by four or more mobile broadband service providers as of October 2012, only 37.4% of rural Americans had similar options.[18]

These figures likely overstate the number of rural Americans who actually have wireless services because there is a critical difference between ***coverage*** and the ***actual provision*** of wireless services: "A provider's having network coverage in an area does not mean that a provider actually offers its service to residents in all of that area." FCC, 16th Wireless Competition Report, *supra*, at ¶ 44. As a result, rural America "comprises the largest portion of unserved

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[18] FCC, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Mobile Competition Report, 28 FCC Rcd. 3700, ¶ 2 at 28 (2013) ["16th Wireless Competition Report"].

and underserved broadband population" in the country.[19]

c. Predictably, the nation's largest carriers do not prioritize rural fixed or mobile broadband capital investment. Katz *et al.*, *supra*, at 6. Sparsely populated geographical areas, such as rural communities, pose a unique challenge to service providers because they often "cannot earn enough revenue to cover the costs of deploying and operating broadband networks, including expected returns on capital" in these areas. *See* CONNECTING AMERICA, *supra*, at 136.

But there are strong reasons to encourage investment in wireless services. Americans in growing numbers are "cutting the cord" and using wireless lines as their sole voice service.[20] Wireless infra-

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[19] Raul L. Katz, Javier Avila, and Giacomo Meille, "Economic Impact of Wireless Broadband in Rural America," Executive Summary, at 6 (2011), *available at* http://competitivecarriers.org / wpcontent / uploads / 2011 / 02 / Economic – Study – Executive Summary-02.24.11.pdf; *see also* FCC, Ninth Broadband Progress Notice of Inquiry, *supra*, at ¶¶ 3, 37-38 (recognizing that "people living in rural and on Tribal lands are disproportionately lacking" access to broadband services); Hanns Kuttner, Hudson Institute, "Broadband for Rural America: Economic Impacts and Economic Opportunities," at 18 (2012), *available at* http://www.hudson.org/content/researchattachments/attachment /1072/ruraltelecom-kuttner--1012.pdf ("[R]ural America stands at a precipice. A growing technology gap looms. Without broader access to broadband capacity, rural America will lack one of the necessary tools to contain, if not narrow, the gap.")

[20] FCC, Indus. Analysis & Tech. Div., Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2013* at 1-2 (June 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0

structure is generally less expensive to build than fixed wireline infrastructure, and wireless services are often the only avenue for providing broadband access to rural communities. Moreover, minority communities "use their mobile devices to access the Internet much more frequently than other racial groups. Indeed, nearly 65% of African Americans rely on their wireless device to access the online world. This [is] largely due to the fact that only 54% of African Americans and 49% of Hispanics have a working computer at home – and mobile broadband is a convenient and attractive alternative for those do not have access to in-home broadband." Minority Media & Telecom Council, *Universal Broadband Adoption: How To Get There, And Why America Needs It*, 14 (2011).[21]

Against this backdrop, the FCC has declared that providing broadband services to all Americans is "*the* great infrastructure challenge of the early 21st cen-

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625/DOC-327830A1.pdf (noting that as of June 2013 there were 306 million mobile telephony subscriptions compared to 135 million wireline retail local telephone service connections).

[21] *See also* U.S. Census Bureau, Pub. No. P20-569, *Computer and Internet Use in the United States: Population Characteristics*, at 12 (2013), *available at* http://www.census.gov/prod/2013pubs/p20-569.pdf ["Census Study"] ("When compared to percentages of home Internet use, smartphones appear to be leveling the Internet use disparities traditionally present for race and ethnicity groups. While 27 percentage points separated the highest and lowest reported rates of home Internet use[,] *** a smaller gap of 18 percentage points emerged once smartphone use was factored into overall connectivity rates[.]").

tury." *See* CONNECTING AMERICA, *supra*, at 3 (emphasis in original). Failure to meet this challenge deprives rural and minority communities of the "economic and employment benefits enabled by the deployment of wireless broadband infrastructure" – benefits that are themselves "contingent on broad access by consumers regardless of their income or location (rural or urban)." Pearce *et al.*, *supra*, at 27; Katz *et al.*, *supra*, at 8 ("unless [rural] communities are given the opportunity to connect to the Internet, they will remain permanently marginalized and the economic penalty would be significant.").

d. CCA's members are poised to meet the challenge of bringing wireless access to all Americans, but they face an uphill fight. One lasting result of the "longstanding regime of state-sanctioned monopolies," *AT&T Corp.*, 525 U.S. at 371, is that the competitive playing field in the telecommunications industry remains uneven. Though Congress passed the Act to "fundamentally restructure[]" telephone markets and encourage "competition among multiple providers," *id.*, the benefits of "incumbency," in many instances, persist.

Recent history suggests that previous competitive gains have slowed, and, in fact, the industry is now sliding closer to a duopoly. "For the last three years," "the Commission was unable to certify that the mobile wireless industry is characterized by 'effective competition,' confirming the highly (and increasingly) concentrated nature of the wireless industry in the hands of the two largest providers," *i.e.*, AT&T and Verizon. *See* CCA White Paper, *supra*, at 2 (citing FCC, 16th Wireless Competition Report, ¶¶ 14-15). In fact, as of 2011, the wireless industry was more

"highly concentrated" than it has ever been. *Id.* at 7; *see also* FCC, 16th Wireless Competition Report, *supra*, at ¶ 59 (citing measure of industry consolidation showing industry to be substantially more concentrated than in 2003). At the end of 2011 almost 70 percent of all industry revenues were paid to the two leading providers. *See* CCA White Paper, *supra*, at 8; FCC, 16th Wireless Competition Report, *supra*, at ¶ 52 (showing concentration of revenue earned by AT&T and Verizon to be about twice that of top two firms in auto, oil, or banking industries).

In other words, wireless consumers nationwide subscribe to a limited range of service providers. *Id.* at ¶ 59. This market concentration becomes even more pronounced as population density declines in a given area. *Id.* at ¶ 60. For this reason, less populated (*e.g.*, rural) areas generally see decreased competition among wireless service providers. With decreased choice comes the potential for diminished services and increased costs for consumers.

e. The disparity between incumbent and smaller carriers is amplified by the difference in spectrum holdings between these two sets of providers. Next-generation telecommunications services are increasingly being deployed on more efficient, lower-frequency spectrum (*e.g.*, 700 MHz, 600 MHz).[22]

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[22] Low-frequency spectrum (*i.e.*, radio frequency waves of a lower megahertz) can travel longer distances and penetrate into buildings better than higher-frequency waves. *See* DOJ Comments, *supra*, at 2. These "superior propagation characteristics," makes a low-frequency network particularly suitable for rural areas. *Id.* at 12. In addition, networks using low-frequency spectrum cost substantially less than high-frequency

Currently, the two incumbent carriers have the "vast majority of low-frequency spectrum," while the two other nationwide carriers have "virtually none." *See* DOJ Comments, *supra*, at 14. Smaller nationwide carriers, along with local and regional carriers, have a "diminished ability to compete, particularly in rural areas where the cost to build out coverage is higher with high-frequency spectrum." *Id.*

The Justice Department has concluded that "there are substantial advantages to making available new spectrum in order to enable smaller or additional providers to mount stronger challenges to large wireless incumbents." *Id.* at 11-12. Such allocation will "play a vital role in protecting, and indeed enhancing, the competitive dynamic to the benefit of American consumers." *Id.* at 8. The FCC is therefore taking steps to improve smaller carriers' access to low-frequency spectrum.

Of course, a carrier's access to low-frequency spectrum has little utility for the industry or for consumers if barriers to using it exist. *See* 2013 FCC NPRM, *supra*, ¶2 ("The ability of wireless providers to meet" the growing demand for services "will depend not only on access to spectrum, but also on the extent to which they can deploy new or improved wireless facilities or cell sites."). To take advantage of access to lower spectrum, smaller carriers will need to build

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networks. *Id.* at 2. One study suggests that it costs nearly 300% more in capital expenditures to deploy a high-frequency network than a low-frequency network with comparable coverage. *Available at* http://apps.fcc.gov/ecfs/document/view?id=7521085197.

new cell sites or substantially upgrade existing facilities, *e.g.*, replace antennas with equipment necessary to use low-frequency spectrum. Therefore, carriers will need to obtain new local government permits to upgrade their networks and take advantage of access to low frequency spectrum.

III. In Keeping With The Act's Goals Of Increased Competition, Section 332(c)(7) Requires A Written Decision That Includes A Local Government's Reasons For Denying A Siting Application.

a. Congress has recognized that state and local regulation of siting applications may impede "rapid deployment of new telecommunications technologies." H.R. Rep. No. 104-204, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61 ("siting and zoning decisions by non-federal units of government[] have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services as well as the rebuilding of a digital technology-based cellular telecommunications network.") (quoted in *Omnipoint Corp. v. Zoning Hearing Bd. Of Pine Grove Township*, 181 F.3d 403, 407 (3d Cir. 1999)).

The FCC agrees. *See* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, Report and Order, 12 FCC Rcd. 10785, ¶90 (1997) ("zoning approval for new wireless facilities" has been "both a major cost component and a major delay factor in deploying wireless systems.") And experience has borne this out. *See City of Ar-*

lington v. FCC, 133 S. Ct. 1863, 1867 (2013) ("in practice, wireless providers often faced long delays.").[23]

To avoid these potential "impediments," Congress imposed "specific limitations" on the traditional authority of state and local governments to regulate "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. §332(c)(7)(B) & (B)(1); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

Among these limitations is Section 332(c)(7)(B)(iii), which provides that any denial by a state or local government of a carrier's "request to place, construct, or modify personal wireless service facilities shall be in writing *and* supported by substantial evidence contained in a written record." 47 U.S.C. §322(c)(7)(B)(iii) (emphasis added). *City of Rancho Palos Verdes*, 544 U.S. at 115 (Congress enacted the "specific limitations" in Section 332(c)(7)(B), including the "in writing" requirement, to prevent inappropriate state and local regulatory activity from becoming a "barrier[] to infrastructure investment.") (citing 47 U.S.C. §322(c)(7)(B)).[24]

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[23] *See also* FCC, Petition for Declaratory Ruling, *supra*, at 14006, 14008 ("record evidence demonstrates that unreasonable delays in the personal wireless service facility siting process have obstructed the provision of wireless services" and that such delays "impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996.").

[24] The unidirectional nature of the judicial review process prescribed in the Act, which excludes a right of review for those who object when an application is granted, underscores how

The disjunctive nature of this provision demonstrates that the reasons for the denial cannot simply be buried in the written record. The statute requires that the written denial be "supported," with the particular reason or reasons identified being justified by "substantial evidence" in the record. By operation of the statute, the reasons for the denial must be included in the written decision. A plurality of this Court has already recognized that "local zoning boards" must both "maintain a 'written record' *and give reasons* for denials 'in writing.'" *City of Rancho Palos Verdes*, 544 U.S. 113, 128 (Breyer, J., joined by Ginsburg, Souter, and O'Connor, JJ., concurring) (emphasis added); *see also Todd*, 244 F.3d at 60 (the Act "distinguishes between a written denial and a written record, thus indicating that the record cannot be a substitute for a separate denial.").

Requiring a writing that articulates the reasons for denial avoids the likelihood that courts will otherwise have to examine, as the district court did here, voluminous (or scant) administrative records to try to guess the reasons for a local government's decision to deny a siting application. A reasoned decision informs a service provider's choice to pursue litigation, and makes any subsequent judicial review process more efficient and economical. A simple denial that does nothing but point to the record provides parties

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Congress wanted siting applications to be treated by local governments. *See, e.g., Industrial Comm'n & Elec., Inc. v. Town of Alton*, 646 F.3d 76, 79 (1st Cir. 2011) (§322(c)(7)(5) only allows for review of denials, not grants); *Drago v. Garment*, 691 F. Supp.2d 490, 491 (S.D.N.Y. 2010) (same).

and reviewing courts with no such insight. Instead, it drives up the cost of litigation and thus the cost of siting wireless facilities.

Properly understood, then, the "in writing" provision not only facilitates judicial review, it enhances competition by reducing the cost of litigation. As discussed above, litigation costs affect smaller carriers disproportionately because the high-frequency spectrum and technology they currently employ requires more cell sites than their incumbent competitors. And while moving to lower frequency spectrum will reduce the number of new siting applications by smaller carriers and improve their services, these carriers will still be required to file applications to improve or modify existing sites.

b. Section 332(c)(7)(B)(iii)'s legislative history supports the majority view that the Act requires a separate writing that explains the reasons for the denial of an application. The Conference Report for the Act states that "[t]he phrase 'substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions." 104th Cong., 2nd Sess., House Rpt. 104-458, 104 H. Rpt. 458 at 208 (Telecommunications Act of 1996) (Jan. 31, 1996) (Conference Report); *see also Todd*, 244 F.3d at 58 ("the 'substantial evidence' standard is 'the same as that traditionally applicable to a review of an administrative agency's findings of fact.'").

c. Time-honored rules of judicial review likewise support this reading. A "simple but fundamental rule of administrative law," stretching back more than seventy years and pre-dating the adoption of the APA, is that "a reviewing court, in dealing with a determination or judgment which an administrative

agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"). An "important corollary" to this rule is that:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

Id. at 196-97. "In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'" *Id.* (quoting *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935)) *see also S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery I*") ("courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review.").

This Court has repeatedly adhered to this principle when reviewing agency action. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) (agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the

agency itself."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("courts may not accept appellate counsel's post hoc rationalizations for agency [orders]."); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011) (same).

Even the Eleventh Circuit recognizes this rule. *See Preferred Sites, LLC v. Troup Cty.*, 296 F.3d 1210, 1220 n.9 (11th Cir. 2002) (locality "may not rely on rationalizations constructed after the fact to support the denial of [the carrier's] application.").

In sum, the majority position is consistent with the statutory text, structure, and history. It is consistent with this Court's long-established jurisprudence regarding judicial review of agency action. And it furthers the goals of the Act – to encourage the deployment of the nation's telecommunications infrastructure and thereby benefit consumers by promoting increased competition among providers and decreasing regulation by state and local governments that contravene the Act's objectives.

IV. The Court Of Appeals' Decision Flouts The Language And Purpose Of The Act.

In this case, the City of Roswell failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. In fact, the denial contains no "grounds invoked by the [City]" whatsoever. *Chenery II*, 332 U.S. at 196. Because the City made no attempt to explain the factual basis or the reasoning for its decision, the decision does not withstand scrutiny under time-honored principles of judicial review of agency actions. *Burlington Truck Lines, Inc.*, 371 U.S. at 168-69 (order

"[must] be upheld, if at all, on the same basis articulated in the order by the agency itself.").

Moreover, what little one can glean from the record reinforces the premise that the actual reasons for a denial must be articulated. One of the City's board members who voted against T-Mobile's application stated that "other carriers apparently have sufficient coverage in this area," and "[i]t's not our mandate to level the field." J.A. 173-74. Such a rationale is expressly prohibited under the Act which forbids "unreasonably discriminat[ing] among providers of functionally equivalent services" and "prohibiting the provision of personal wireless services." *See* 47 U.S.C. §332(c)(7)(B)(i)(I), (II).[25]

Of course, this is precisely the kind of speculation in which reviewing courts should not indulge, and is precisely why Section 332(c)(7)(B)(iii) requires that any denial explain the bases for that decision in writing. *See Chenery II*, 332 U.S. at 196-97 ("It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.").

Unless the decision is reversed, smaller carriers filing siting applications in regions governed by the minority view will continue to face litigation costs

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[25] *See also* FCC, Petition for Declaratory Ruling, *supra*, at 14016 ("a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation" in violation of Section 332(c)(7)(B)(i)(II)).

that effectively impede competition and prevent underserved communities served by CCA's carrier members from obtaining access to improved wireless technologies.

CONCLUSION

For the foregoing reasons, Competitive Carriers Association joins Petitioner in urging the Court to reverse the *Eleventh* Circuit's judgment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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T-MOBILE SOUTH LLC,
Petitioner,

v.

CITY OF ROSWELL, GEORGIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus CTIA—The Wireless Association® ("CTIA") is an international nonprofit organization that represents the wireless communications industry.[2] CTIA's members include wireless carriers, suppliers, manufacturers, providers of data services and products, and countless other contributors to the wireless communications industry. CTIA regularly appears before the Court in cases presenting issues of importance to the wireless industry. *See, e.g.*, *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014); *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013); *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

CTIA has an interest in this case because the question presented will affect how well the Telecommunications Act of 1996 ("1996 Act") serves the important federal policy of encouraging rapid deployment of wireless services and networks. Expanding existing networks to meet the ever-growing demand for faster and more robust wireless services is vital to the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* represent that all parties have consented to the filing of this brief through the filing of letters granting blanket consent to the filing of *amicus* briefs.

[2] CTIA was founded in 1984 as the Cellular Telecommunications Industry Association. In 2000, CTIA merged with the Wireless Data Forum and became the Cellular Telecommunications & Internet Association. In 2004, the name was changed to CTIA—The Wireless Association®.

industry that CTIA represents and to the national economy. This case presents important issues relevant to the prompt deployment of those networks, and thus strongly implicates the interests of CTIA and its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The wireless industry is facilities-based and depends on quick and effective judicial review of local zoning decisions to meet the ever-growing consumer demand for more and better wireless services. That demand has grown tremendously in recent years. By the end of 2013, there were more than 335 million wireless subscriber connections.[3] Wireless connections outpace not only the number of wired end-users, but also the entire population of the United States.[4] In 2013, wireless subscribers transferred more than 3.2 trillion megabytes of data, used more than 2.6 trillion minutes of talk time, and transmit-

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[3] *See* CTIA, *Annual Wireless Industry Survey* ("*CTIA Survey*"), *available at* http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey (last visited July 3, 2014).

[4] *See* CTIA, *US Wireless Connections Surpass Population*, *available at* http://www.ctia.org/resource-library/facts-and-infographics/archive/more-wireless-subscriber-connections-than-us-population (last visited July 3, 2014). According to the Federal Communications Commission ("FCC"), "[i]n June 2013, there were 90 million end-user switched access lines [i.e., landlines] in service, 45 million interconnected VoIP [Voice over Internet Protocol] subscriptions, and 306 million mobile subscriptions in the United States, or 441 million retail local telephone service connections in total." FCC, Indus. Analysis & Tech. Div., Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2013*, at 1 (June 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327830A1.pdf.

ted more than 1.9 trillion text messages.[5] During the first half of 2013, 39.4% of all households in the United States relied exclusively on wireless telephones (and 65.6% of all adults ages 25-29 lived in wireless-only households).[6]

To keep pace with such explosive growth, the wireless industry in the United States invests billions of dollars every year to build or upgrade tens of thousands of wireless facilities in communities throughout the country.[7] These investments include investments in building facilities for wireless broadband. That investment is projected to increase GDP in the U.S. by as much as $100 billion in 2017 and to create up to 1.2 million net new jobs.[8]

In order to construct these tens of thousands of needed wireless facilities, a provider must obtain

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[5] *See CTIA Survey.*

[6] *See* Centers for Disease Control, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2013*, at 1, 2 (Dec. 2013), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf.

[7] *See* CTIA, *Annualized Wireless Industry Survey Results*, at 2, 12 (2014) (cumulative capital investment of nearly $400 billion in 2013), *available at* http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2; *see also id.* at 2, 11 (more than 300,000 reported commercially operational cell sites in 2013).

[8] *See* Alan Pearce, et al., *Wireless Broadband Infrastructure: A Catalyst for GDP and Job Growth 2013-2017*, at 1 (PCIA – The Wireless Infrastructure Association, Sept. 2013), *available at* http://www.pcia.com/images/IAE_Infrastructure_and_Economy_Fall_2013.PDF. Of those 1.2 million projected net new jobs, 28,000 come directly from investment in wireless broadband facilities, and the remainder come from effects on other industries. *See id.* at 25, tbl. D.

permission from a state or local government entity – usually, a zoning board or its equivalent. Often, this process is swift and routine, because local governments across the country are familiar with the need to build and modify wireless facilities and providers are experienced with the requirements in the relevant localities.

Yet, there are still too many cases of obstruction and delay. The problem in such cases is often one of incentives. While the whole community benefits from having a new facility and thus better service, usually only nearby landowners who object to the facility have enough of an incentive to communicate with their representatives or attend meetings to protest. *See Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 51 n.9 (1st Cir. 2009) (describing this "'not in my backyard'" problem).

As part of the 1996 Act, Congress gave wireless service providers a remedy for that problem. While preserving many aspects of local zoning authority, *see* 47 U.S.C. § 332(c)(7)(A), the 1996 Act imposes both procedural and substantive limits on that authority and provides for federal judicial review of local zoning decisions to ensure that the statutory requirements are honored. At issue in this case is one aspect of that federal scheme: the requirement that local zoning decisions with respect to wireless facilities "shall be in writing and supported by substantial evidence contained in a written record." *Id.* § 332(c)(7)(B)(iii).

The best reading of that statutory requirement is that it creates a duty for a local authority to incorporate in its written decisions the reasons for which it has denied the request in dispute.

First and foremost, the text and structure of § 332(c)(7)(B)(iii) support a requirement that a locality write down the reason or reasons it reached its conclusion. In particular, the requirement that the denial of a request be "in writing" must be read in the context of the requirement that it be "supported by substantial evidence contained in a written record." That language indicates Congress's intent that judicial review of local decisions take place under well-settled principles of administrative law. Those principles, in turn, require that the agency set forth the reasons that support its decision, so that a reviewing court can determine whether the reasons that the agency gave are in fact supported by substantial evidence in the record. Simply put, the reference to the "substantial evidence" standard strongly indicates that Congress understood that a local zoning authority would provide in writing the reasons necessary to permit judicial review. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., joined by Ginsburg, Souter & O'Connor, JJ., concurring) (observing that § 332(c)(7)(B)(iii) "requires local zoning boards . . . to . . . *give reasons* for denials 'in writing'") (emphasis added).

Further, this construction is also necessary in order to ensure that § 332(c)(7)(B) as a whole serves the purposes for which it was intended. In particular, § 332(c)(7) mandates expedited court review. Such quick and efficient judicial review would be undermined by the conclusion that a local authority may require reviewing courts to search through the full record in an attempt to divine the reason or reasons that motivated that entity's conclusion. Beyond that, moreover, the federal statute includes

important substantive prohibitions on local action that would be much more difficult for courts to apply if no statement of reasons were required.

Experience with the practical application of § 332(c)(7)(B) confirms that reviewing local zoning decisions without the benefit of a reasoned written decision is burdensome at best and verges on the impossible at worst. As the cases discussed below demonstrate, *see infra* pp. 18-21, courts cannot reliably review locality decisions that consist of conclusory denials supported by unhelpful meeting minutes and transcripts.

Finally, requiring written statements of reasons is likely to conserve judicial resources in another way as well: by promoting the resolution of wireless facility siting disputes without litigation.

ARGUMENT

SECTION 332(c)(7)(B)(iii) SHOULD BE READ TO REQUIRE A REASONED DECISION IN WRITING

Section 332(c)(7)(B)(iii) requires that the "decision" of a local zoning authority "to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

The best reading of this mandate is that the local authority's decision must set forth in writing the reasons for the challenged denial. That statutory requirement cannot be satisfied by a mere statement that a denial has occurred.[9] Although elaborate

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[9] The entirety of the letter denying the application in this case is as follows:

> Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-

findings are not necessary, the denial must provide sufficient reasons to allow judicial review as to whether those reasons are supported by substantial evidence. As T-Mobile has persuasively shown in its brief, that construction is supported by the statute's text, history, and purpose. CTIA will not repeat T-Mobile's arguments, but instead highlight a few points about the statute that deserve emphasis. CTIA will also provide the Court with some concrete examples of why this understanding of the statutory scheme is important to achieving Congress's procedural and substantive purposes.

A. The Text of § 332(c)(7)(B)(iii) Requires a Written Decision That Includes Reasons

The phrase "decision . . . in writing," in the context of a judicial or quasi-judicial body, is most naturally read to include written reasons for the decision as well as the conclusory indication of the result. If a district court rules on an issue before it from the bench, one would not ordinarily say that the court had rendered a "decision . . . in writing" merely because the court's clerk made a (written) indication of the ruling on that court's docket – like the clerk's letter here. Nor would one say that the decision was in writing because the court's (spoken) words were recorded in the (written) transcript. Instead, one would refer to the decision itself as having been made orally. A local zoning authority is acting in a

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pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number].

If you have any additional questions, please contact me at [phone number].

Pet. App. 9a (brackets in original).

quasi-judicial capacity,[10] and the same basic understanding should apply. If Congress intended to allow a one-word denial conveying only the result to satisfy the statute, it would have used a word such as "notification" or "conclusion" or "result" instead of "decision."

The Court need not rest on that understanding alone, however. In this context, that ordinary-language interpretation of the written-decision requirement is strongly buttressed by the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) (internal quotation marks omitted). Here, § 332(c)(7)(B)(iii) requires *both* that a state or local government's denial of a request be "in writing" *and* that it be "supported by substantial evidence contained in a written record." To give both requirements meaning, the written decision must exist apart from the written record; and the natural inference is that Congress meant the decision and the record to serve distinct (though related) purposes in the process of federal judicial review. *See Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.") (internal quotation marks omitted). If, by contrast, the written-decision requirement could be met by a mere statement that the reasons for decision could be found in the record, the written-decision requirement would add nothing to the

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[10] *See, e.g., Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 409 (3d Cir. 1999) (describing the quasi-judicial status of a zoning board under Pennsylvania law).

statutory requirement of a "written record," and the requirement of a "decision . . . in writing" would be superfluous.

This understanding is further reinforced by the presumption that, "when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (internal quotation marks omitted). The phrase "substantial evidence" is such a term of art, and it has a well-understood meaning: it refers to a well-understood standard employed for many decades in judicial review of administrative action. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951) (interpreting the Administrative Procedure Act ("APA") in light of its "[r]etention of the familiar 'substantial evidence' terminology" from older cases).[11] Because "'substantial evidence' is a legal term of art, . . . presumably Congress intended the term [in § 332(c)(7)(B)(iii)] to carry the same meaning it carries in administrative law." *United States Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 255 (5th Cir. 2004). Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support

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[11] Further, because (as *Universal Camera* recognized) the phrase "substantial evidence" derives from nonstatutory pre-APA case law, it forms part of the "background of common-law adjudicatory principles" against which Congress is presumptively "understood to legislate." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (stating that this presumption applies "except when a statutory purpose to the contrary is evident" (internal quotation marks omitted)).

a conclusion." *Consolidated Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938).[12]

Applying that settled standard, incorporated in the text of § 332(c)(7), requires an agency to state the basis (or bases) for its decisions. The court must then determine whether *those stated conclusions* are supported by substantial evidence in the record. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The agency must make findings that support its decision, and those findings must be supported by substantial evidence.") (citing *ICC v. J-T Transp. Co.*, 368 U.S. 81, 93 (1961), *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 488-89 (1942), and *United States v. Chicago, M., St. P. & P.R.R. Co.*, 294 U.S. 499, 511 (1935), for this proposition); *see also, e.g., Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) (describing substantial-evidence review as testing the validity of "a record-based factual conclusion").

A court undertaking traditional review of administrative action does not scour the record so that it can attempt to surmise what the agency's reasons may have been – or what reasons might hypothetically have supported the agency's action, which in the end is the same thing. To the contrary, foundational precedent expressly forbids a reviewing court from taking that approach. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (explaining that agency "action cannot be upheld merely because findings might have been made and considerations disclosed which would justify" that action); *International Union, United Auto., Aerospace & Agric. Implement Workers*

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[12] *See also MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 725 (9th Cir. 2005) (collecting cases applying the substantial-evidence standard to § 332(c)(7)(B)(iii)).

of Am. (UAW) v. NLRB, 459 F.2d 1329, 1346 (D.C. Cir. 1972) (describing the expectation that administrative agencies "are required to give rational reasons for their decisions" as the "underlying supposition upon which the vast structure of administrative law is built").

By contrast, judicial review in which courts look at hypothetical reasons that *might have been* given (rather than actual reasons that *have been* given) is associated with the most deferential form of rational-basis review of legislative action. *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) (asking whether "there is an evil at hand for correction, and [whether] it might be thought that the particular legislative measure was a rational way to correct it"). It would be unlikely under any circumstances that Congress meant to incorporate that approach into review of quasi-judicial action under § 332(c)(7)(B)(iii), and impossible that Congress would have done so in a provision that calls explicitly for substantial-evidence review.

B. The History and Purpose of § 332(c)(7)(B)(iii) Support an Interpretation That Requires Written Reasons

The legislative history of the 1996 Act confirms – briefly, but in clear terms – that Congress meant to refer to the "traditional standard used for judicial review of agency actions" in § 332(c)(7)(B)(iii). H.R. Conf. Rep. No. 104-458, at 208 (1996) (explaining that the reference to "'substantial evidence contained in a written record'" was meant to incorporate that "traditional standard").[13] That standard, as we have

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[13] Courts have relied on that statement in interpreting and applying § 332(c)(7)(B)(iii). *See, e.g., Cellular Tel. Co. v. Town*

already explained, necessarily incorporates the requirement that agencies give reasons for their decisions – and indeed cannot be applied coherently without such a requirement.

In addition, as discussed further below, the statutory written-decision requirement can only serve the purposes that Congress meant to achieve with § 332(c)(7) if it is interpreted to include written reasons. That is so for two reasons. *First*, the text of the statute demonstrates that Congress intended to create a judicial-review process that was quick and efficient. That statutory evidence weighs heavily against a process in which wireless service providers and courts must sift through the record in an effort to infer all potential bases for a decision and the evidentiary support (if any) for each basis. *Second*, Congress also included several substantive prohibitions in § 332(c)(7) that can be effectively enforced only if courts can reliably determine the reasons behind local action.

1. Congress Intended Judicial Review Under § 332(c)(7) To Be Speedy and Efficient

Congress intended judicial review of local zoning actions to proceed with dispatch. It manifested this intent most directly by mandating that any such action be "hear[d] and decide[d] . . . on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). That provision was intended to work together with the requirement that a locality respond to a wireless siting or modification request "within a reasonable period of time

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of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999) ("In determining whether the denial was supported by substantial evidence, we must employ 'the traditional standard used for judicial review of agency actions.'").

. . . , taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii). Read together, those provisions indicate a policy of ensuring not only that wireless providers are able to build and upgrade their facilities without unreasonable local obstruction, but also that they are able to do so quickly. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (recognizing that § 332(c)(7) sought to "encourage the rapid deployment of new telecommunications technologies" by "reduc[ing] . . . the impediments imposed by local governments upon the installation of [wireless] facilities") (internal quotation marks omitted); *see also* Pub. L. No. 104-104, 110 Stat. 56, 56 (1996 Act is an "Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); H.R. Conf. Rep. No. 104-458, at 113 (purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services").

The FCC has also recognized the importance of speed to the statutory scheme. Implementing the requirement in § 332(c)(7)(B)(ii) that a state or local government respond to a wireless siting or modification request "within a reasonable period of time," the Commission issued a declaratory ruling,[14] ultimately affirmed by this Court, that a "reasonable period of time" is presumptively 90 days to process an applica-

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[14] Declaratory Ruling, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd 13994 (2009) ("*Wireless Siting Ruling*").

tion to place a new antenna on an existing tower and 150 days to process all other applications. *Wireless Siting Ruling* ¶ 32. The Commission determined that these presumptive "shot clock" time periods were necessary because "unreasonable delays in the personal wireless service facility siting application process have obstructed the provision of wireless services." *Id.* ¶ 34. It reasoned that such delays "impede the promotion of advanced services and competition that Congress deemed critical in" the 1996 Act. *Id.* ¶ 35.[15]

Courts of appeals and district courts have likewise recognized the importance of quick judicial action in implementing this statutory and regulatory scheme. For example, there has been widespread adoption among the courts of appeals and district courts of the principle that an immediate injunction ordering the issuance of the requested permits is normally the appropriate remedy for an adjudication of a violation of § 332(c)(7).[16] As the First Circuit has explained,

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[15] The presumptive deadlines in the Commission's order were upheld by the Fifth Circuit as a "permissible construction of § 332(c)(7)(B)(ii) and (v) . . entitled to *Chevron* deference," *City of Arlington v. FCC*, 668 F.3d 229, 256 (5th Cir. 2012); this Court affirmed the application of *Chevron* deference and the judgment, 133 S. Ct. 1863, 1874-75 (2013).

[16] *See, e.g.*, *New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1222 (11th Cir. 2002); *Omnipoint*, 181 F.3d at 410; *Cellular Tel.*, 166 F.3d at 497; *Cincinnati Bell Wireless, LLC v. Brown Cnty.*, No. 1:04-CV-733, 2005 WL 1629824, at *5 (S.D. Ohio July 6, 2005); *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108, 120-21 (D. Mass. 2000).

> [t]he statutory requirements that the board act within "a reasonable period of time," and that the reviewing court hear and decide the action "on an expedited basis," indicate that Congress did not intend multiple rounds of decisions and litigation, in which a court rejects one reason and then gives the board the opportunity, if it chooses, to proffer another.

National Tower, 297 F.3d at 21.

The requirement that localities' written decisions identify the reasons for the denial of a request contributes to courts' ability to address these cases quickly and efficiently. A written statement of reasons enables wireless service providers to provide reviewing courts with arguments targeted to the actual reasoning of local decisions, rather than trying to rebut every possible basis for a decision that might be found in a potentially voluminous record. That is particularly important because providers will be appearing as plaintiffs and so will generally need to prepare their arguments without seeing the local authority's response.

Similarly, the burden of expedited review on the district courts will be much decreased if that review can focus on the actual reasoning of local decisions. If localities are not required to provide a written statement, much judicial time and effort will be needlessly wasted as courts comb through the record of the locality's decision-making process in an attempt to surmise what reason or reasons may have motivated the body's ultimate conclusion. That concern has been a significant motivating factor for the numerous circuits that have interpreted the written-decision requirement to include written reasons. *See, e.g., Omnipoint Holdings, Inc. v. City of*

Southfield, 355 F.3d 601, 606 (6th Cir. 2004) ("The primary purpose of the separate writing requirement is to allow a reviewing court to focus with precision on the action that was taken and the reasons supporting such action.");[17] *see generally In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (reasoning that judicial review of agency action can be "accurate[] and efficacious[]" only where the agency "indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act"). Where, as here, expedited judicial review is an explicit goal, it is especially important for the reviewing court to be able to focus quickly on the actual reasons for the decision under expedited review.

2. Requiring Localities To Give Reasons Is Necessary To Enforce the Substantive Provisions of § 332(c)(7)(B)

In § 332(c)(7)(B), a subsection entitled "Limitations," Congress also placed several substantive restrictions on local zoning authority. Under those restrictions, regulations by local authorities "shall not unreasonably discriminate among providers of functionally equivalent services," 47 U.S.C. § 332(c)(7)(B)(i)(I);

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[17] *See also Helcher v. Dearborn Cnty.*, 595 F.3d 710, 718 (7th Cir. 2010) ("The purpose of the 'in writing' requirement is to allow for meaningful judicial review of local government actions relating to telecommunications towers."); *MetroPCS*, 400 F.3d at 722 ("If [judicial review for substantial evidence] is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record."); *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001) ("[P]ermitting local boards to issue written denials that give no reasons for a decision would frustrate meaningful judicial review, even where the written record may offer some guidance as to the board's rationale.").

"shall not prohibit or have the effect of prohibiting the provision of personal wireless services," *id.* § 332(c)(7)(B)(i)(II); and may not be "bas[ed on] the environmental effects of radio frequency emissions," so long as provider "facilities comply with [FCC] regulations concerning such emissions," *id.* § 332(c)(7)(B)(iv). A clear indication of the actual basis for local decisions is necessary to ensure that there can be an effective federal judicial remedy for violations of these substantive provisions.

The problem is that the written record supporting a locality's decision – especially if presented in a disorganized form such as the minutes of a public meeting – will frequently suggest both potentially lawful reasons for denying permission to build a facility (such as aesthetic concerns raised by a particular proposal) and unlawful reasons (such as health concerns about radio frequency emissions that are permitted by FCC standards). If there is no authoritative statement of the reasons for which permission has been denied, a reviewing court will have great difficulty determining whether the local authority properly rejected the unlawful reasons or improperly accepted them. *See Southwestern Bell*, 244 F.3d at 60 (noting the difficulties of "determining the rationale behind a [zoning] board's decision" in the face of a record that "reflects arguments put forth by individual members rather than a statement of the reasons that commanded the support of a majority of the board").

The district court's opinion in this case illustrates the point: the minutes and transcript of the hearing reflected that of the six Council members who voted to deny T-Mobile's application; one did not speak at all; one asked questions but gave no reasons for

his vote; one gave reasons that suggested an impermissible reason for denying the application;[18] two referred briefly to the "compatibility" of the tower with its surroundings; and one gave a relatively longer explanation of her reasons. Pet. App. 28a-29a. Faced with this record, the district court reasonably expressed frustration at the lack of any "clear articulation of the rationale of the Council as a whole for denying the application." *Id.* at 28a.[19]

C. Experience Under § 332(c)(7) Confirms the Importance of Requiring Localities To Give Written Reasons

The difficulties faced by the district court in this case in attempting to conduct judicial review under § 332(c)(7)(B) without the benefit of written reasons are echoed in the experience of other district courts who have experienced similar problems.

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[18] *See* Pet. App. 29a (discussing the comments of Commissioner Kent Ingleheart, who "expressed concern that 'other carriers apparently have sufficient coverage in this area,' . . . stated that '[i]t's not our mandate to level the field for inferior technology[,]' . . . [and] stated his view that cell towers should never be allowed in residential areas"). Had respondent based its denial of the application on the availability of coverage from other carriers, it would have violated § 332(c)(7)(B)(i)(II). *See Wireless Siting Ruling* ¶ 56.

[19] The court of appeals apparently would have permitted judicial review on the basis of the longer statement, treating it as the rationale of the entire Council. Pet. App. 15a. But there is no indication that the two reasons cited by that particular Council member (aesthetic incompatibility and adverse impact on property values) were the Council's rationale. To the contrary, only a plurality of the Council ("[t]hree of the six council members") mentioned concerns about "the tower's incompatibility with the neighborhood" and "[o]nly one . . . cited the tower's adverse impact on property values." *Id.* at 30a.

1. In *Omnipoint Communications, Inc. v. Town of LaGrange*, 658 F. Supp. 2d 539 (S.D.N.Y. 2009), the court reviewed a denial letter that "merely advised T-Mobile that its application had been denied, leaving it up to the imagination of T-Mobile (and this Court) to speculate as to why the [zoning board] chose to act as it did." *Id.* at 554. In reviewing the record, the court struggled to determine the reasons for the zoning board's actions. *See, e.g., id.* at 556 ("[Mr. Zeidan] was against it. He did not specify why he was against it."). The court noted that most of the record consisted of comments from the public, many of which involved desires to deny the application which were explicitly unlawful under the 1996 Act. *Id.* at 554. It therefore declined to "parse [the] record and guess which of the things mentioned therein was ultimately found persuasive." *Id.*

2. In *American Towers, Inc. v. Wilson County*, No. 3:10-cv-1196, 2014 WL 28953 (M.D. Tenn. Jan. 2, 2014), the district court confronted a record that included four zoning board hearings and seven planning commission hearings on a total of four applications (two before the board, and two before the commission), over the course of nearly two years, for permission to construct a single facility. *See id.* at *1-5. The denials came in the form of "note[s] on the paper applications" that the applicant had filed, supplemented by "meeting minutes and hearing transcripts" for the entire 11-hearing process. *Id.* at *6-7. After reviewing these materials, the district court found itself unable to "discern after studying them the arguments the Zoning Board and Planning Commission relied on as opposed to the arguments those bodies found unavailing." *Id.* at *7.

3. In *Smart SMR of New York, Inc. v. Zoning Commission of Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998), the district court found a record that "reflect[ed] . . . only . . . [i]ndividual [zoning] [c]omission members' opinions," with no indication of the "[c]omission's collective reasoning." *Id.* at 57. The court noted the "burden" of "wad[ing] through the record below in an attempt to discern the [c]ommission's rationale," *id.*; it then went on to shoulder that burden in a lengthy analysis, reviewing the record in some detail and explaining that a number of the concerns raised by the individual members were in any event unlawful or unsupported by record evidence, *see id.* at 57-60.

4. In *T-Mobile South LLC v. City of Milton*, Civil Action No. 1:10-CV-1638-RWS, 2011 WL 2532920 (N.D. Ga. June 24, 2011), *on recon.*, Civil Action No. 1:10-CV-1638-RWS, 2011 WL 6817820 (N.D. Ga. Dec. 28, 2011) *rev'd and remanded*, 728 F.3d 1274 (11th Cir. 2013), the district court was faced with a situation where a city sought to defend the denial of a permit on two bases, one of which (the lack of a wind-load certification as required by ordinance) the plaintiff contended was a pretext adopted only after the fact. *See id.* at *3 & n.3. The court found itself unable to evaluate the denial for substantial evidence because the absence of written reasoning left it "unable to readily discern which motivation the City Council actually relied upon." *Id.* at *3.[20]

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[20] After remand from the Eleventh Circuit, the district court in the *City of Milton* case recently upheld the city's decisions. *See T-Mobile S. LLC v. City of Milton*, Civil Action No. 1:10-CV-1638-RWS, 2014 WL 2766092 (N.D. Ga. June 18, 2014). In doing so, the court concluded that the "comments" of two city planning commissioners and one city Council member suffi-

Cases such as these and others[21] illustrate the fundamental difficulty that will confront district courts across the country if this Court accepts respondent's view of the statute: a statutory imperative to conduct substantial-evidence review combined with a purported "decision" that does not permit such review to go forward in any recognizable or meaningful form. Congress did not intend the protections it provided for in § 332(c)(7) to be frustrated in this manner.

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ciently "suggested" a "balanc[ing] [of] the specific aesthetic concerns of the community with the purported need for additional coverage." *Id.* at *13 & n.5. Taken as a whole, its analysis gives the distinct impression of a conscientious and thorough district judge being compelled by the governing circuit-court standard to put words in the city's mouth.

[21] *See also, e.g., Sprint Spectrum L.P. v. County of San Mateo*, No. C 08-0342 CW, 2013 WL 6326489, at *5 (N.D. Cal. Dec. 4, 2013) (denial letter "contained only one sentence explaining the Board's decision" and was internally contradictory because it "cited 'information provided by staff' as one of the evidentiary bases for the Board's decision" but "failed to acknowledge that the staff itself had recommended granting Sprint's permit request"); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 745 (C.D. Ill. 1997) (district court confronted record with conflicting evidence (including objections based on impermissible concerns) and was unable to determine county's rationale: "If the County weighed all of this conflicting evidence and found the general complaints of citizens more compelling than the findings of the County's zoning experts, then the County should have said so in a written order"); *Western PCS II Corp. v. Extraterritorial Zoning Auth. of City & Cnty. of Santa Fe*, 957 F. Supp. 1230, 1236 (D.N.M. 1997) (record before district court that "clearly indicate[d] only the rationale of one member" of the zoning authority "frustrate[s]" the ability of the "court to ascertain the rationale behind a denial so that it can determine if that denial comports with the requirements of the statute").

D. Requiring Localities To Give Written Reasons Also Promotes Efficient Dispute Resolution

Requiring localities to give written reasons for a decision to deny permission to build or modify a wireless facility will also encourage the resolution of local zoning disputes through means other than litigation. That will promote not only the specific policies of § 332(c)(7), but also general interests in judicial economy.

In particular, a local authority's articulation of reasons for rejecting a particular application submitted by a wireless provider will frequently suggest ways in which the locality's concerns can be resolved other than litigation. If so, it may well be in all parties' interests to pursue such a resolution rather than to file suit. Such a resolution may well be surer and more prompt than even expedited litigation. Moreover, whether they win or lose in court, wireless providers still have to live with the governments of the local communities in which they provide service. Providers thus have no incentive to file suit if there is a feasible alternative; and, by requiring localities to identify specific problems with applications, the statutory scheme increases the likelihood that such an alternative can be found.

In addition, the availability of a reasoned decision before a complaint must be filed will reduce uncertainty – and therefore litigation – by assisting both providers and the localities to assess the likely outcome of a challenge that is filed in court. Providers will be less likely to challenge denials for which a locality has produced a reasonable basis that has record support, and localities will be less likely to engage in protracted defenses of reasoning that

appears indefensible on its face. The rule endorsed by the Eleventh Circuit, by contrast – in which a locality can issue a conclusory denial and then wait as late as summary judgment to select reasons from a record to defend it – will breed uncertainty and litigation. This Court should reject that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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July 10, 2014

AMICUS CURIAE BRIEF

No. 13-975

IN THE

Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE UNITED STATES CONFERENCE OF MAYORS, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national organizations representing local governments and their personnel—both elected and appointed. They represent governments and government officials in every state and of all sizes. *Amici* respectfully submit this brief to protect the sovereign interests of state and local governments that make wireless siting and other local land use decisions and that are responsible for balancing federal obligations with their own laws and procedures. They urge the Court to reject arguments by T-Mobile and its wireless industry *amici*, which would impose stringent procedural requirements that are not supported by the plain text of 47 U.S.C. § 332(c)(7)(B)(iii) and which would contribute neither to sound substantive decisionmaking at the local level nor to the granting of meritorious wireless siting applications.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief through the filing of letters granting blanket consent to the filing of *amicus* briefs.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes nearly 1,400 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating for and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Representing more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The American Planning Association is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes in order to advance the art and science of land use planning—including physical, economic, and community planning—at the local, regional, state, and national levels. The American Planning Association's mission is to encourage planning that will contribute to the public's

well-being today, as well as to the well-being of future generations, by developing sustainable and healthy communities and environments. The American Planning Association has 47 regional chapters and represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues nationwide.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns 47 U.S.C. § 332(c)(7), a provision of the Telecommunications Act of 1996 ("the 1996 Act") that preserves to local governments, subject to certain exceptions, most of their traditional land use authority over the siting and zoning of wireless facilities. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended throughout Sections of 47 U.S.C.). As groups that represent local governments and their employees across the nation, *amici* represent those that are tasked with carrying out Section 332(c)(7) on a day-to-day basis and within the resource constraints of their respective jurisdictions—be it a large city with a dedicated legal and planning staff or a small town in a rural area lacking even a single full-time employee devoted to those tasks.

T-Mobile and its wireless industry *amici* urge this Court to adopt an interpretation of Section 332(c)(7)(B)(iii)'s "in writing" requirement that would put local governments of all sizes under far more stringent procedural requirements than Congress has imposed on federal courts and federal agencies that are subject to other statutory "writing" requirements. Such an interpretation is not supported by the plain text of the statute, by its legislative history, by the weight of precedent, or by considerations of public

policy. *Amici* believe that T-Mobile's interpretation of the "in writing" requirement would impose significant additional costs on, and unreasonably burden the ability of, local governments to carry out land use regulation—a core local function—within their jurisdictions.

On its facts, this is a peculiar case. Unlike virtually all other courts in similar circumstances, the district court here reached and decided the case solely on what it concluded was the City's failure to satisfy Section 332(c)(7)(B)(iii)'s "in writing" requirement and then issued an injunction granting T-Mobile's application. This was an error. As *amicus* United States demonstrates, the reasons for the City's decision could readily be gleaned from the written minutes and transcript of the city council meeting which were before the district court, and the court's professed inability to discern those reasons stemmed not from the inadequacy of the minutes or transcript, but from the district court's clear misreading of them. As a result, the court of appeals was put in the position of likewise reaching and deciding only the "in writing" issue. It held, consistent with its prior decision in *T-Mobile South, LLC v. City of Milton,* 728 F.3d 1274 (11th Cir. 2013), that the "in writing" requirement is satisfied where, as here, the locality issues a written denial letter and the reasons for the locality's decision can be gleaned from the written minutes or transcript. Pet. App. at 16a. The court of appeals accordingly reversed and remanded the district court's decision.

The Eleventh Circuit was correct. Common tools of statutory interpretation and construction reveal that the imposition of T-Mobile's stringent interpretation of the statute's "in writing" requirement would be contrary to Congressional intent. Further,

the practical effects of T-Mobile's reading of the statute would be to impose substantial new costs and burdens on local governments without providing any benefit in terms of facilitating the grant of meritorious wireless siting applications.

A review of lower court Section 332(c)(7) case law reveals that T-Mobile's construction of the statute's "in writing" component is not aligned with how courts typically review local government siting decisions. And a heightened "in writing" requirement would also be misaligned with the practical realities of how elected local government bodies operate and the resource limitations they face.

Requiring local governments to make written minutes and transcripts available "contemporaneously" with their decision in writing—as *amicus* United States advocates—is similarly misguided. Such a requirement is unnecessary for the successful operation of Section 332(c)(7) and unsupported by the purposes of the statute. Further, a "contemporaneously available" requirement targets an issue—the 30-day deadline to file suit under Section 332(c)(7)(B)(v)—that was not an issue below and is not before this Court. Compliance with a "contemporaneously available" requirement would have made no difference in this case because the district court mistakenly failed to consider the council minutes in its decision.

The judgment of the Eleventh Circuit should therefore be affirmed.

ARGUMENT

I. SECTION 332(c)(7) PRESERVES LOCAL AUTHORITY SUBJECT ONLY TO LIMITED EXCEPTIONS.

1. This case concerns a single provision of the 1996 Act. That provision, Section 332(c)(7), is entitled "Preservation of local zoning authority." It provides, in its opening lines, that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). To be sure, Section 332(c)(7)(B) sets forth specific limitations on local governments' exercise of land use authority over wireless facilities. But Section 332(c)(7)(A)'s "nothing in this chapter" phraseology provides reviewing courts with a "rule of statutory construction" that must guide, and confine, the reading of the balance of Section 332(c)(7). *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373 (1986).

T-Mobile and its industry *amici* ignore this rule, focusing instead only on the 1996 Act's more general objective "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers." Pet. Br. at 2-3 (quoting Pub. L. No. 104-104, 110 Stat. 56 (1996)); *accord* PCIA Br. at 16; Competitive Carriers Association ("CCA") Br. at 7; CTIA Br. at 13. But, in the context of a dispute about the language of Section 332(c)(7), the 1996 Act's generalized policy and purpose cannot be read to overcome either the plain language or Congress's specific purposes in enacting Section 332(c)(7). "Every statute purposes, not only to achieve certain ends, but

also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." *Dir., Office of Workers' Comp. v. Newport News Shipbuilding*, 514 U.S. 122, 136 (1995). As this Court has observed, "no legislation pursues its purposes at all costs . . . and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original).

2. In Section 332(c)(7), Congress made a very deliberate choice that was different from the sweeping, general objectives of the 1996 Act. The Conference Report provides that this section was created to:

> prevent[] Commission preemption of local and State land use decisions and preserve[] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.

H.R. Conf. Rep. No. 104-458, at 207-08 (1996), *reprinted in* 1996 U.S.C.C.A.N. 142, 222. At the same time, Congress made clear to the Federal Communications Commission ("FCC") that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service] facilities should be terminated." *Id.* at 208.

Further, Congress showed an awareness of local land use procedures, recognizing that wireless siting requests may involve "a zoning variance or a public hearing" and noting that "[i]t is not the intent of this provision to give preferential treatment to the

personal wireless service industry in the processing of requests." *Id.*

Both the plain text of Section 332(c)(7) and its legislative history demonstrate that Congress made preservation of local authority over land use a priority. And there are deeply rooted reasons why Congress chose to do so. Courts have repeatedly found that "[l]and use decisions are basically the business of state and local governments." *Am. Tower LP v. City of Huntsille*, 295 F.3d 1203, 1206 (11th Cir. 2002) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (noting that "regulation of land use [is] a function traditionally performed by local governments") and *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (stating that "regulation of land use is perhaps the quintessential state activity")). Indeed, "land-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community." *Gardener v. City of Balt.*, 969 F.2d 63, 67 (4th Cir. 1992); *see also Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 828 (4th Cir. 1995).

Section 332(c)(7) "is a deliberate compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." *Town of Amherst v. Omnipoint Commc'ns Enters. Inc.*, 173 F.3d 9, 13 (1st Cir. 1999). As four concurring justices of this Court stated in *Ranchos Palos Verdes v. Abrams*, Congress rejected a top-down federal government approach to wireless siting, instead "substitut[ing] a system based on cooperative federalism. State and local authorities would remain free to make siting decisions," though they would do so

subject to certain federal standards. 544 U.S. 113, 128 (2005) (internal citation omitted).

Here, T-Mobile and its industry *amici* urge the Court to rewrite Section 332(c)(7)'s simple "in writing" requirement to place on local governments the burden of crafting separate written decisions that must satisfy the formal "findings and conclusions" requirements imposed on specialized federal agencies by the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(c)(3)(A). They ignore the reality, recognized by most courts, that unlike federal agencies subject to the APA, local bodies making wireless siting decisions, particularly in small communities, are typically composed of layperson generalists, not lawyers or telecommunications specialists. T-Mobile's reading of the "in writing" requirement would upset the deliberate balance struck by Congress, and the court of appeals was correct to reject it.

II. BOTH GENERAL PRINCIPLES OF STATUTORY CONSTRUCTION AND THEIR APPLICATION TO ANALAGOUS STATUTES SUPPORT THE COURT OF APPEALS' INTERPRETATION OF THE "IN WRITING" REQUIREMENT.

Basic tools of statutory construction lay bare the flaws in T-Mobile's and its industry *amici*'s reading of Section 332(c)(7)(B)(iii)'s "in writing" requirement.

1. As this Court has often repeated, the first place to start in interpreting a statute is with its plain meaning. *See Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984) (the first step in statutory analysis "always, is the question [of] whether Congress has directly spoken to the precise question at issue"). The court of appeals properly

concluded that the plain meaning of the "in writing" requirement is just that: "in writing." The statute says nothing about a formal written decision containing findings and conclusions.

Here, T-Mobile received a "written denial," and, as the Eleventh Circuit found, the reasons for "the denial could be gleaned from the written transcript and the written minutes of the [city council] hearing." Pet. App. at 17a. Taken collectively, these written documents surely satisfy the brief phrase "in writing." Indeed, *amicus* United States agrees. U.S. Br. at 25-26.

Where Congress has intended to require a formal, separate written decision setting forth findings and reasons, it has said so. It did not do so in Section 332(c)(7). Other sections of the 1996 Act specifically require a more detailed writing—a requirement of "written findings as to any deficiencies" in 47 U.S.C. § 252(e)(1) and a requirement that the FCC "state the basis for its approval or denial" in 47 U.S.C. § 271(d)(3). Congress's deliberate and contemporaneous choice of different, and far more sparse language in Section 332(c)(7)(B)(iii) should be respected rather than deemed an oversight. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

2. Further, T-Mobile's and its industry *amici*'s argument that the "in writing" requirement mandates that the reasons for a locality's decision be set forth in a written decision rather than in the minutes or transcript of a local council meeting is flatly at odds with how other federal statutes that impose written decision requirements far more expansive than Section 332(c)(7)(B)(iii) have been construed. For instance, 18 U.S.C. § 3142(i)(1) requires a district court to "include written findings of fact and a written statement of the reasons" to justify the detention of

a defendant pending trial. Yet even there, where a defendant's liberty interests are at stake, a district court may satisfy this written findings and reasons requirement with a transcript of a hearing that contains the court's findings and reasons. *United States v. Peralta*, 849 F.2d 625, 626 (D.C. Cir. 1988) ("We find no cause to remand when the transcript clearly embodies the district court's findings and reasons for detention."); *see also United States v. English*, 629 F.3d 311, 320-21 (2d Cir. 2011) ("[W]here the court's findings and reasons for issuing a detention order are clearly set out in the written transcript of the hearing, the requirement of a writing is satisfied.").

If setting forth findings and reasons in a court transcript is sufficient to satisfy 18 U.S.C. § 3142(i)(1)'s written findings and reasons requirement, then surely council meeting minutes or a transcript are sufficient to satisfy Section 332(c)(7)(B)(iii)'s far simpler "in writing" requirement. Nothing in Section 332(c)(7) or its legislative history remotely suggests that Congress intended to place greater burdens on local governments than it has placed on federal courts and federal agencies, and as discussed above, much suggests Congress intended in Section 332(c)(7) to place a lesser burden on local governments.

3. T-Mobile's and some of its industry *amici*'s argument that Section 332(c)(7)(B) "differentiates a local government's written 'decision' from the 'written record'" suffers from a similar flaw. Pet. Br. at 27; CTIA Br. at 8; Chamber of Commerce Br. at 8. Read in context, the "written record" referred to in Section 332(c)(7)(B)(iii) is the *evidentiary* record. However, Section 332(c)(7)(B)(iii) does not dictate the form that record must take. The minutes or a transcript of a local council meeting, can and often do include both

the evidentiary record *and* the council's decision. That decision is no less of a decision "in writing" merely because it was delivered in a single document with the evidentiary record, rather than broken into two documents. *See Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606-07 (6th Cir. 2004).

4. T-Mobile and some of its *amici* argue that requiring local governments to provide reasons for denials separate from the written minutes or transcript is needed to prevent localities from engaging in *post hoc* rationalization of their decisions. Pet. Br. at 29. T-Mobile ignores, however, that the separate, formal written decision that it asserts the statute requires would necessarily have to be drafted sometime after the hearing and the council vote. How a later-drafted formal written decision would be less susceptible to *post hoc* rationalization, T-Mobile does not, and cannot, say.

As was the case here, a local government's record typically consists of the minutes and a transcript from the public meeting at which a hearing is held and a decision is made on a wireless siting application. The locality does not attempt to supplement the record or alter its rationale by later finalizing the minutes, but rather ensures the minutes accurately reflect the events at the public meeting before they are finalized. As was also the case here, those minutes and transcript are prepared before litigation and are presented to the reviewing court. T-Mobile's concerns about *post hoc* rationalization are therefore unfounded.

III. COURTS HAVE CONSIDERED THE PRACTICAL RESOURCE LIMITATIONS OF LOCAL GOVERNMENTS WHEN INTERPRETING THE OBLIGATIONS SECTION 332(c)(7) PLACES ON LOCAL GOVERNMENTS, AND IT IS PROPER TO DO SO HERE.

This Court and others have recognized that Section 332(c)(7) requires a balancing to be made between, on the one hand, the obligations it imposes on local governments and, on the other, the practical realities and resource limitations of local governments. This balancing counsels against T-Mobile's rigid, APA-style reading of the "in writing" requirement.

1. This Court considered that balancing in *Ranchos Palos Verdes*, 544 U.S. at 123, where it held that Section 332(c)(7) precludes an action for damages under 42 U.S.C. § 1983. The Court noted the inherent resource asymmetry between local governments and telecommunications providers, stating that "in the § 332(c)(7) context, making local governments liable for the (often substantial) legal expenses of large commercial interests for the misapplication of a complex and novel statutory scheme" would "have a particularly severe impact" on local governments. *Id.*

Courts of appeals that previously considered the same question—and which were cited by the Court in *Ranchos Palos Verdes*—likewise recognized that resource asymmetry and, relatedly, the practical limitations of local governments. Then-Judge Alito, writing for the Third Circuit, emphasized that "[Section 332(c)(7)] plaintiffs are often large corporations or affiliated entities, whereas [Section 332(c)(7)] defendants are often small, rural municipalities." *Nextel Partners, Inc. v. Kingston Twp.*, 286 F.3d 687,

695 (3rd Cir. 2002). Indeed, "[s]uch municipalities may have little familiarity with [Section 332(c)(7)] until they are confronted with a [Section 332(c)(7)] claim, and in land-use matters they may generally rely on attorneys who may likewise know little about [Section 332(c)(7)]." *Id.* The Third Circuit then concluded that this imbalance counsels against "increas[ing] the federal burden on local land-use regulation beyond what Congress intended." *Id*; *accord PrimeCo Pers. Commc'n, Ltd. P'ship v. City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003) (in Section 332(c)(7) cases, "[large wireless carriers] find themselves opposed not by other large corporations but by small towns, such as Mequon, [Wisconsin], population 21,000, with a planning commission some of whose members double as aldermen").

Most of the courts that have considered the "in writing" requirement have likewise found that it, too, must be read in light of the practical resource limitations faced by local governments. For instance, the First Circuit, while ruling that a decision "in writing" requires more than the court of appeals did here, noted that the "[p]assage of the [1996 Act] did not alter the reality that the local boards that administer the zoning laws are primarily staffed by lay-people." *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 59 (1st Cir. 2001); *accord MetroPCS, Inc. v. City and Cnty. of S.F.*, 400 F.3d 715, 722 (9th Cir. 2005).

These courts' observations are supported by available empirical evidence. Data from the U.S. Census Bureau's 2012 Census of Governments demonstrate the widely varying amounts of resources and expertise available to local governments of different sizes and in different locations. U.S. Census Bureau, *2012 Census of Governments: Employment*,

2012 Local Government: Individual Government Data and ID File, Census.gov.[2] Those data do not isolate zoning and land use personnel specifically, but include them in the category, "Other Government Administration" personnel. Even looking at that broader group—which includes members of city and town councils, boards of supervisors, commissioners, executive officers such as city managers and mayors, and clerks and recorders—a full 61% of municipalities and townships do not have a single full-time paid employee in the "Other Government Administration" category. Percentages derived from U.S. Census Bureau, *2012 Census of Governments*. Seventy-one percent have no more than one full-time paid employee, and 33% of that group have no more than one part-time paid employee as well. *Id.*

Those limitations notwithstanding, the wireless siting decisions made by local governments are, of course, subject to review under Section 332(c)(7) and must be supported by substantial evidence. That does not mean, however, that it is "realistic to expect highly detailed findings of fact and conclusions of law" from non-lawyer laypeople. *Sw. Bell Mobile Sys.*, 244 F.3d at 59; *see also MetroPCS, Inc.*, 400 F.3d at 722.

2. To be sure, courts appear to be in uniform agreement that the amount of evidence that constitutes "substantial evidence" within the meaning of Section 332(c)(7)(B)(iii) does not differ from the more conventional "substantial evidence" standard for review of agency decisions: it is "more than a scintilla" but "less than a preponderance." *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999); *see also Am. Tower Corp. v. City of San Diego*, No. 11-

[2] *Available at* https://www.census.gov/govs/apes/.

56766, at 31 (9th Cir. Aug. 14, 2014). Contrary to T-Mobile's and its supporting *amici*'s claims, however, it does not follow that Congress intended the short phrase "in writing" to import the same demands on local governments as the more elaborate written findings and reasons language found in the APA and other federal statutes does of federal agencies. As the Fourth Circuit observed, "the 'reasonable mind' of a legislator is not necessarily the same as the 'reasonable mind' of a bureaucrat, and one should keep the distinction in mind when attempting to impose the 'substantial evidence' standard onto the world of legislative decisions." *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d 423, 430 (4th Cir. 1998). To the contrary, "[i]t is not only proper but even expected that a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters." *Id.* Constituent views, "if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators." *Id.*

3. Local councils acting on wireless siting applications are subject to additional constraints that agencies subject to the APA are not and that, in many cases, aim to prioritize collection of constituent viewpoints. This same set of constraints should be considered when discussing how the sparse phrase "in writing" should be construed. Unlike federal agencies, local councils are often required by state or local laws to hold public hearings before acting on land use applications, including those related to wireless siting. That means, first, that the public must be given the opportunity to participate orally at that hearing, and second, that the record is therefore not complete until the close of the hearing, after which the

local council typically votes immediately. Local councils do not have the luxury of sifting through the evidence for as much time as they wish—especially in light of the many other competing and time-consuming items on their agenda—to craft a written decision complete with formal findings and reasons. Rather, councils typically rely on the minutes of the meeting to perform that function.

These elements are key components of the local government land use process that Congress recognized and did not intend to overturn in Section 332(c)(7). The local government's responsibility under Section 332(c)(7) is to balance the community's land use interests with the wireless provider's facility deployment interests, subject to the limitations of Section 332(c)(7)(B). The statute is not intended to transform a local government into an expert wireless siting agency dragooned into complying with the formal procedural requirements that other federal statutes impose on specialized expert federal agencies.

4. Industry *amici* point to the costs of litigation for carriers that might result from anything less than formal written findings and reasons. *See* Chamber of Commerce Br. at 22; CCA Br. at 25-26. But they overlook that local governments also bear the costs of litigation, when it occurs, as well as the cost of reviewing applications within the timeframe required by the FCC's shot clock rules and, of course, the costs of issuing a decision that complies with the other requirements of Section 332(c)(7)(B). Although the Competitive Carriers Association's brief focuses on the need for broadband expansion in rural communities, CCA Br. at 25-26, the localities in those areas are often among those with the fewest and least expert staff and with the fewest resources for

litigation. *See Rancho Palos Verdes*, 544 U.S. at 123-24 (observing the resource disadvantages of municipal defendants vis-à-vis wireless providers).

5. Together, these concerns—the limited resources of local governments and the constituent-focused public hearing requirements of state and local law—counsel against grafting the APA's full written findings and reasons requirement onto Section 322(c)(7)(B)(iii)'s "in writing" requirement. On an issue such as local land use in particular, where there is such a long and recognized history of local control, that reality cannot be lightly discarded; nor is there any evidence that Congress intended to do so when it enacted Section 332(c)(7).

As the First Circuit has observed, "ultimately, we are in the realm of trade-offs . . . . But subject to an outer limit," the trade-offs were left by Congress for local governments to resolve. *Town of Amherst*, 173 F.3d at 15. T-Mobile's interpretation of the "in writing" requirement, in contrast, would needlessly, and improperly, expand the burden and expense placed on local governments.

IV. T-MOBILE'S RIGID AND DEMANDING INTERPRETATION OF THE "IN WRITING" REQUIREMENT IS NOT NECESSARY TO PROMOTE WIRELESS DEPLOYMENT.

T-Mobile and its industry *amici* claim that the court of appeals' simple, plain-meaning construction of "in writing" would frustrate the 1996 Act's goal of promoting deployment of wireless facilities and services. Pet. Br. at 31; PCIA Br. at 23; Towercom Br. at 4; CCA Br. at 25-26; Chamber of Commerce Br. at 21-22; CTIA Br. at 13, 15. But that claim is belied by industry's own data.

1. Since the passage of the 1996 Act, wireless facilities deployment has flourished. Between 1996 and 2013, for instance, CTIA-The Wireless Association, an *amicus* supporting T-Mobile here, reports that the number of CTIA members' cell sites grew tenfold, from 30,045 to 304,360. CTIA-The Wireless Association, Annual Year-End 2013 Top-Line Survey Results, CTIA.org (2014)[3]; CTIA Br. at 2 n.7. Much of that growth has been in recent years: the number of cell towers has more than doubled in the last decade. *Id.* There also has been significant wireless deployment in Roswell, Georgia. As the City notes in its brief, there are currently 32 cell tower sites in the 42 square miles of the City of Roswell. Resp. Br. at 5; J.A. at 133. Seventeen of those towers were used by T-Mobile at the time of its application in 2010. *Id.*

In short, Section 332(c)(7), as it has been implemented by local governments, has allowed wireless facilities siting to mushroom. There certainly is no evidence that the Fourth and Eleventh Circuits' interpretation of the "in writing" requirement, about which T-Mobile and its industry *amici* complain, has been an obstacle to wireless deployment in the regions encompassed by those circuits.

Nor is there evidence that T-Mobile has been placed at any competitive disadvantage or that local land use authorities have prevented it from expanding its wireless coverage. In July 2014, T-Mobile informed investors that it is the fastest growing wireless company in America and that its network covers 233 million Americans in 325 metro areas. T-Mobile US Inc., *T-Mobile US Reports Second Quarter 2014*

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[3] *Available at* http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2.

Results, Fastest Growth, Fastest Network and Best Customer Service in the Industry (July 31, 2014).[4] At that time, T-Mobile stated that its "network expansion is continuing at an accelerated pace" and that "[t]he improvements to increase speed, capacity, and coverage across the T-Mobile network footprint are rapid and ongoing." *Id.*

Accordingly, T-Mobile's and industry *amici*'s rigid and stringent interpretation of the "in writing" requirement is not about promoting wireless facility deployment. It is about imposing more burdens and costs on local governments, particularly small local governments, in the course of carrying out their traditional governmental functions.

V. A WRITTEN DECISION SEPARATE FROM THE MINUTES OR TRANSCRIPT IS NOT REQUIRED FOR SUBSTANTIAL EVIDENCE REVIEW.

T-Mobile and its industry *amici* claim that a separate written decision setting forth reasons is necessary for a court to apply the "substantial evidence" standard. But an examination of "in writing" decisions, even those with which the court of appeals disagreed, belies that claim.

T-Mobile and its industry *amici* argue that a denial letter that does not specify reasons for the denial unduly burdens the judiciary with the task of reviewing the record to ascertain the reasons for the decision. Pet. Br. at 34-35; Chamber of Commerce Br. at 21. Courts, however, routinely review the record in Section 332(c)(7) challenges, and doing so is not an

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[4] *Available at* http://investor.t-mobile.com/file.aspx?IID=4091145&FID=24663128.

undue or extra burden. In fact, such review is necessary to determine whether the decision is supported by substantial evidence, as well as whether it complies with Section 332(c)(7)(B)'s other requirements. And courts have had little difficulty discerning the reasons for a locality's decision from the minutes or transcript.

1. *Courts of Appeals.* Of all the "in writing" Section 332(c)(7) cases reaching the courts of appeals, only in the *Roswell* and *Milton* decisions did first the district court, and then the court of appeals, address and resolve the case *solely* on "in writing" grounds. Pet. App. at 14a-18a; *Milton,* 728 F.3d at 1285-86. In the other cases, the district courts, and then the courts of appeals, addressed other Section 332(c)(7) issues beyond the "in writing" requirement. *See Helcher v. Dearborn Cnty.,* 595 F.3d 710, 722-23 (7th Cir. 2010) (addressing "in writing" requirement and substantial evidence challenge); *MetroPCS,* 400 F.3d at 723-24 (same); *City of Southfield*, 355 F.3d at 606-07 (addressing "in writing" requirement and 30-day statute of limitations); *New Par v. City of Saginaw,* 301 F.3d 390, 396-97 (6th Cir. 2002) (finding order not "in writing" but also not supported by substantial evidence); *Sw. Bell Mobile Sys.,* 244 F.3d at 60 (addressing "in writing" requirement and substantial evidence issues); *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312 (4th Cir. 1999) (same); *City Council of Va. Beach*, 155 F.3d at 427-29 (considering "in writing" requirement, substantial evidence challenge, and unreasonable discrimination challenge).

In no case has a court of appeals found that, regardless of whether the "in writing" requirement was satisfied, the record was insufficient for a court to

engage in "substantial evidence" review. In fact, the Eighth Circuit recently sided with the Eleventh and Fourth Circuits on the "in writing" issue and had no difficulty conducting substantial evidence review. *NE Colo. Cellular, Inc. v. City of North Platte,* No. 13-3190 (8th Cir. Aug. 22, 2014).

2. *District Courts.* *Amicus* CTIA cites several district court decisions as examples where it claims courts have had "difficulties" conducting judicial review due to the local government's failure to satisfy the "in writing" requirement. CTIA Br. at 18-21. CTIA mischaracterizes the Section 332(c)(7) case law. As noted above, although there are cases in which local governments have been found to have failed to comply with the statute, in the overwhelming majority of those cases, district courts have not decided the case solely on "in writing" grounds but have instead gone on to the "substantial evidence" issue, even if compliance with the "in writing" requirement was also at issue.

In *Omnipoint Communications, Inc. v. Town of LaGrange*, for instance, the court found the town's compliance with both the "in writing" and "substantial evidence" requirements to be at issue. 658 F. Supp. 2d 539, 553-58 (S.D.N.Y. 2009). The court did not stop at the "in writing" requirement, however, noting that it would be "rely[ing] solely on a technicality" if it were to do so. *Id.* at 554.

The same is true of all but one of the district court decisions CTIA cites: the supposed "in writing" shortcoming of the locality's decision notwithstanding, the court nevertheless reached and decided the "substantial evidence" issue. *See Am. Towers, Inc. v. Wilson Cnty.*, No. 3:10-cv-1196, 2014 WL 28953 at *11 (M.D. Tenn. Jan. 2, 2014) (finding no substantial

evidence for any of the reasons given for denial); *Sprint Spectrum L.P. v. Cnty. of San Mateo*, No. C 08-0342 CW, 2013 WL 6326489 at *3-4 (N.D. Cal. Dec. 4, 2013) (evaluating written decision against evidence in the record); *Ill. RSA No. 3, Inc. v. Cnty. of Peoria*, 963 F. Supp. 732, 743 (C.D. Ill. 1997) (noting that the lack of substantial evidence was a "more substantial basis" for ruling against the local government than the "in writing" requirement); *W. PCS II Corp. v. Extraterritorial Zoning Auth. of City & Cnty. of Santa Fe*, 957 F. Supp. 1230, 1236 (D.N.M. 1997) (holding that "the record does not provide any indicia of 'substantial evidence' which would support a denial of the special exemption request on any legitimate ground").

The lone exception is *Smart SMR of New York, Inc. v. Zoning Commission of the Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998). Even there, however, the *Smart SMR* court addressed and resolved the wireless provider's argument that the town had violated another substantive requirement of Section 332(c)(7)(B)—namely, that the local decision had the effect of prohibiting the provision of personal wireless services. Thus, the *Smart SMR* decision was also not based solely on the "in writing" requirement. *Id.* at 58.

3. The district court here, in contrast, decided the case solely on the "in writing" requirement, declining to reach any of the other Section 332(c)(7) issues raised. As a result, the court of appeals did likewise. Pet. App. at 16a-18a. And based solely on the City's supposed failure to comply with the "in writing" requirement, the district court imposed the draconian remedy of ordering the City to grant T-Mobile's application rather than reaching the substantial evidence question or remanding to the City to correct

the supposed "in writing" deficiency. Pet. App. at 34a-35a. That is plainly at odds with what other courts have done in similar circumstances. *See, e.g., AT&T Wireless Servs. of Fla., Inc. v. Orange Cnty.*, 982 F. Supp. 856, 859, 862 (M.D. Fla. 1997) (remanding on the basis of the county's failure to meet the in writing requirement and stating that the court "is loathe to trespass on that [local land use] authority" by ordering injunctive relief).

4. When coupled with T-Mobile's argument that the "in writing" requirement demands that a locality immediately draft and issue a separate written decision that will allow the reviewing court to be "sure to know" the reasons for a denial, Pet. Br. at 22, the district court's action would straitjacket a local government in a way that even federal agencies subject to more demanding written findings and reasons requirements are not. T-Mobile's position would mean that a locality, unlike a federal agency or a court,[5] would have but one opportunity to draft a decision that would satisfy T-Mobile's "sure to know" standard, on penalty of having the reviewing court order the wireless provider's application granted, without even addressing substantial evidence or other issues.

T-Mobile is therefore arguing that under Section 332(c)(7)(B)(iii)'s "in writing" requirement, localities must clear an even higher bar than federal agencies under the APA, as well as a higher bar than the courts of appeals that have adopted a more stringent "in

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[5] Under *SEC v. Chenery Corporation*, 318 U.S. 80 (1943), and its progeny, and on which T-Mobile and industry *amici* heavily rely, the typical remedy is to remand to the agency to give it the opportunity to better explain its reasons, not to foreclose the agency entirely.

writing" requirement have set, and that the price for not clearing that bar should be grant of the wireless provider's application. When a court, like the district court here, deems that injunctive relief is appropriate without reaching the substantial evidence or other substantive Section 332(c)(7)(B) issues, it frustrates Section 332(c)(7)'s purpose, discussed in Section I above, of balancing the land use interests of a local government and its residents with wireless deployment. T-Mobile's position elevates a wireless provider's interest in having its application granted, regardless of that application's merits, above the local government's land use process and interests in reviewing and acting on that application. *See PrimeCo Pers. Commc'ns, L.P. v. Vill. of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999) ("We continue to believe that granting PrimeCo's request for an injunction under these specific circumstances would have been unfair to the Village, and upsetting to the balance intended by Congress when it reserved zoning authority to municipalities.").

5. The failure by the district court here, unlike almost all other courts, to reach any issue other than the "in writing" issue also leads to judicial inefficiency. An inquiry into whether the denial was supported by substantial evidence (or whether the decision was inconsistent with any of the other substantive requirements of Section 332(c)(7)(B)) is necessary for the court to determine whether the proper remedy is a remand to the locality or an injunction ordering the locality to issue the permit. *See T-Mobile Ne. LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 463 (S.D.N.Y. 2009) ("But at least for violations of the substantial evidence provision, 47 U.S.C. § 332(c)(7)(B)(iii), almost all courts to address the question have held that 'the appropriate remedy is injunctive relief in the form of

an order to issue the relevant permits.'" (quoting *Town of Oyster Bay*, 166 F.3d at 497, and citing *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2012))).

If a court were to remand solely on the basis of a locality's failure to satisfy the "in writing" requirement without reaching Section 332(c)(7)'s other requirements, the wireless provider would likely bring another court challenge in the event that the locality again issues a written decision denying the application, and at that point the court would need to reach the substantial evidence question. It would be a far more efficient use of judicial resources, as well as more consistent with the expedited court review process that Section 332(c)(7)(B)(v) requires, for courts not to consider the "in writing" requirement in isolation, but to instead, in the first instance, also consider whether there is substantial evidence to support the denial.

VI. *AMICUS* UNITED STATES' PROPOSED "CONTEMPORANEOUSLY AVAILABLE" REQUIREMENT RELATES TO AN ISSUE NOT BEFORE THE COURT AND IS INCONSISTENT WITH THE STATUTE.

As noted above, we wholeheartedly agree with *amicus* United States that Section 332(c)(7)(B)(iii) does not require that a locality's reasons be set forth in a separate written decision, U.S. Br. at 24-26, and that instead, as the court of appeals held, the "in writing" requirement is satisfied as long as the applicant receives a written decision and the reasons for a locality's decision can be gleaned from the written minutes or written transcript. Pet. App. at 17a. The United States goes on to argue, however, that where a locality relies on the written minutes or transcript to lay out the reasons for its decision, the minutes or

transcript "must be made available at substantially the same time as the written decision denying the request," U.S. Br. at 26-27, and here, according to the United States, it was not, *id.* at 28-31. The United States believes that "contemporaneously available" minutes or a transcript are necessary because of the short 30-day limitations period for the wireless provider to seek judicial review under Section 332(c)(7)(B)(v). *Id.* at 28. The United States' "contemporaneously available" requirement is misguided in several respects, and the Court should reject it.

1. The United States' proposed "contemporaneously available" requirement relates not to the "in writing" requirement—the only issue before the Court—but to the 30-day review period in Section 332(c)(7)(B)(v), which is not before the Court. There is no dispute here that T-Mobile satisfied Section 332(c)(7)(B)(v)'s 30-day limitation requirement. Nor can there be any claim of prejudice suffered by T-Mobile as a result of the delay in finalizing the written minutes of the hearing: both the written minutes and the written transcript were available before the lawsuit was filed and were before the district court when it made its decision. The City's decision should not be overturned, and T-Mobile's application ordered granted, based on a "contemporaneously available" requirement that did not appear until an *amicus* raised it in this Court.

2. The United States' "contemporaneously available" requirement is contrary to Congress' intent. The Conference Report makes clear that the Section 332(c)(7)(B)(ii) requirement that a locality must act on a wireless siting application "within a reasonable period of time" was "not intend[ed] . . . to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject

their requests to any but the generally applicable time frames for zoning decisions." H.R. Conf. Rep. No. 104-458, at 208. Yet, by requiring wireless siting applications, and only wireless siting applications, to be subject to a "contemporaneously available" requirement, that is precisely what the United States' proposed new requirement would do. Nor should any delay in a locality's finalizing of the minutes be of any concern. The locality's final decision, as reflected in the written minutes, would still be subject to the FCC's presumptive "shot clock" deadlines that this Court upheld in *City of Arlington v. FCC*, 133 S.Ct. 1863, 1874 (2013).

3. There is no requirement in Section 332(c)(7)(B) that local governments defer transmission of the written decision until the final minutes are available. Indeed, localities usually transmit a short letter notifying the wireless provider of the denial in response to the provider's request for such a letter. The 30-day period in which to initiate judicial review should be deemed to run from the point at which the locality's action is final—namely, when the local government has made available the official written minutes.

4. Reading Section 332(c)(7)(B) to require localities to provide contemporaneous minutes—or to pay for contemporaneous transcripts—for wireless siting applications would substantially burden local governments and upset the balance Congress sought to strike in that provision. *See USCOC of Greater Mo. v. City of Ferguson*, 583 F.3d 1035, 1042 (8th Cir. 2009) ("The statute requires only 'a written record,' and establishes no specific requirements as to its nature."). Local governments already must comply with a variety of state and local legal requirements

in reviewing and acting on applications, including requirements for public notice, hearing, and other procedures, and the preparation of contemporaneous minutes, rather than the preparation of minutes in the normal course, is neither necessary for nor aligned with the goals of Section 332(c)(7).

5. In practice, the "contemporaneously available" requirement would place an even greater burden on localities under Section 332(c)(7)(B)(iii) than the APA places on federal agency decisions. Agencies often vote on a decision on one date but issue a formal written decision much later; in other words, the APA does not require agencies to issue a "contemporaneous" writing explaining the reasons for their decision. Yet, as noted above, no court, and not even T-Mobile or its industry *amici*, have suggested that Section 332(c)(7)(B)(iii) places a higher burden on local governments than the APA places on federal agencies.

6. The United States' proposed "contemporaneously available" requirement would not have affected the outcome of this case. The district court's decision in this case would not have been different had the City produced contemporaneous minutes or a transcript. To the contrary, the district court had both the City's minutes and T-Mobile's transcript before it, yet as the United States notes, U.S. Br. at 29-30, the court considered only the transcript. Neither the City's brief written decision nor the delay in producing the written minutes had any impact on the district court's decision. The United States' new "contemporaneously available" requirement therefore provides no basis for reversing the court of appeals' decision to reverse and remand to the district court.

VII. BECAUSE OF THE CLEAR ERRORS MADE BY THE DISTRICT COURT, THE COURT OF APPEALS' REVERSAL AND REMAND WAS CORRECT, AND THIS COURT SHOULD THEREFORE AFFIRM.

As the United States points out (and we agree), the reasons for the City's denial of T-Mobile's application were apparent from the minutes and the transcript, U.S. Br. at 17, 30-31 & n.6, and the district court thus erred in concluding otherwise. Moreover, as the United States also points out (and we agree), the district court apparently overlooked the minutes—even though they were before it—and instead relied exclusively on the transcript, which contained an error that, in turn, led the district court to "mistakenly count[ ]" the City Administrator as a Councilmember. *Id.* at 29-30.

The district court thus committed clear error in reviewing the record before it, and one that even "contemporaneous" minutes would not have avoided. The court of appeals' disposition of the district court's judgment—reversing and remanding—was therefore correct, and on this ground alone, the court of appeals should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Petitioner,

v.

CITY OF ROSWELL, GEORGIA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

T-MOBILE SOUTH LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

PCIA – The Wireless Infrastructure Association ("PCIA") respectfully submits this brief as *amicus curiae* in support of Petitioner T-Mobile South LLC.

PCIA is the trade association representing the companies that make up the wireless telecommunications infrastructure industry. PCIA's members

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

develop, own, manage, and operate towers, rooftop communications sites, and other facilities used for the provision of all types of wireless, telecommunications, and other services. PCIA and its members partner with communities across the nation to facilitate the widespread deployment of communications networks. It thus seeks to advance the key mission of the Federal Communications Commission ("FCC") under the Telecommunications Act of 1996 ("1996 Act"): "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "remov[ing] barriers to infrastructure investment." 47 U.S.C. § 1302.

PCIA and its members have an abiding interest in this case. The Eleventh Circuit's incorrect interpretation of the statute, 47 U.S.C. § 332(c)(7)(B), allows localities to issue siting denials without an accompanying explanation, thus preventing applicants from receiving a final decision on their wireless siting applications in the "expedited" manner the statute commands. Without the ability to deploy infrastructure quickly and where needed, America's wireless companies and infrastructure providers cannot effectively meet the nation's broadband deployment goals and satisfy exploding consumer demand. The decision should be reversed.

SUMMARY OF ARGUMENT

This Court has previously recognized that wireless carriers and infrastructure providers face barriers in siting their facilities. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1867 (2013). Among these

barriers are local siting decisions that omit reasons for denial and frustrate expedited court review of those decisions. The steady removal of siting barriers has been the goal of a multi-year, multi-prong effort by Congress, the Administration, the FCC, and other stakeholders in order to expedite the delivery of advanced wireless services, including broadband services, to consumers.

These services provide unparalleled benefits that make them a national priority. By helping to maintain and improve the data and voice communications fundamental to modern society, advanced wireless services create jobs and grow the economy, bridge the broadband availability gap, and strengthen emergency response and public safety. But they cannot be provisioned without the robust deployment of wireless infrastructure in all its forms, ranging from communications towers that can expand wireless coverage in rural and unserved areas to small antenna installations that can boost capacity in urban centers.

Section 332(c)(7) is designed to help reduce barriers to infrastructure siting. Enacted as part of the 1996 Act, which sought to "remove barriers to infrastructure investment" and "accelerate . . . deployment of advanced telecommunications," *see* 47 U.S.C. § 1302; H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.), the statute requires siting denials to be "in writing and supported by substantial evidence" and subject to "expedited" court review. 47 U.S.C. § 332(c)(7)(B)(iii), (v). The majority of the Circuits have correctly found that the text and underlying

purpose of this section require that written denials explain the reasons for denial.

The majority approach is the only sensible reading of the statute. The alternative advanced by the Eleventh Circuit – written denials that lack any explanation – forces providers and reviewing courts to conduct a scavenger hunt through the record in search of the reasons for denial. The result is more time-consuming litigation and increased costs, contrary to the statute and national broadband priorities. The Court should reverse the Eleventh Circuit ruling and adopt the majority approach.

ARGUMENT

I. THE STATUTE IS DESIGNED TO ADVANCE NATIONAL BROADBAND GOALS.

A. Broadband Benefits the Economy, Consumers, and Public Safety.

Broadband has become an indispensable part of American life: it drives economic growth, increases consumer choice, and helps protect our communities.[2] Broadband is, quite simply, a "national policy imperative," and Congress has declared that every American should have "access to broadband capability." FCC, CONNECTING AMERICA: THE NATIONAL

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[2] *See* FCC, *About Broadband*, *available at* http://www.broadband.gov/about_broadband.html (last visited June 29, 2014). The term "broadband" commonly refers to Internet access at significantly higher speeds than are available through "dial-up" Internet access. *Id.*

BROADBAND PLAN 151 (2010) ("NATIONAL BROADBAND PLAN"); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (2009).

Congress foresaw the importance of broadband when it passed the 1996 Act on a strong bipartisan basis. That act directed the FCC to "encourage the deployment on a reasonable and timely basis" of advanced telecommunications capability, including "broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), *codified at* 47 U.S.C. § 1302. The purpose of the 1996 Act is clear: "to accelerate rapidly private sector deployment of advanced telecommunications." H.R. REP. NO. 104-458, at 113 (Conf. Rep.); *see USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment*, 465 F.3d 817, 820 (8th Cir. 2006) ("The Telecommunications Act of 1996 . . . was intended by Congress to . . . encourage the rollout of new technologies without delay.").

When the 1996 Act was written, broadband was still an emerging service and only a handful of households in a few test markets had broadband access. While analog wireless voice services had been in existence for more than a decade using "cellular" spectrum, the digital wireless services that form the foundation for today's wireless broadband services were still in their infancy; they were born out of the Personal Communications Service ("PCS") spectrum

auctions, which began in 1995.[3] Yet members of Congress clearly recognized the transformative potential of those services: the House Commerce Committee, for example, noted the importance of fostering "deployment of [PCS] as well as the rebuilding of a digital technology-based cellular telecommunications network" in order to "speed deployment and the availability of competitive wireless *telecommunications* services [that] ultimately will provide consumers with lower costs as well as with a greater range and options for such services." H.R. REP. NO. 104-204, pt. 1, at 94 (1995). President Clinton called the final legislation "truly revolutionary" and predicted it would "bring the future to our doorstep." Remarks on Signing the Telecommunications Act of 1996, 32 WEEKLY COMP. PRES. DOC. 215, 215 (Feb. 12, 1996).

Today, that broadband future is arriving for many Americans. Broadband provides a platform for economic growth and job creation – according to a recent study, mobile broadband investments in the United States will increase Gross Domestic Product in 2017 by up to $355.3 billion and generate up to 1.2 million net new jobs. ALAN PEARCE ET AL., INFORMATION AGE ECONOMICS, WIRELESS

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[3] "Spectrum is the range of electromagnetic radio frequencies used to transmit sound, data, and video across the country. It is what carries voice between cell phones, television shows from broadcasters to your TV, and online information from one computer to the next, wirelessly." FCC, *About the Spectrum Dashboard*, *available at* http://reboot.fcc.gov/reform/systems/spectrum-dashboard/about (last visited June 24, 2014). The FCC licenses spectrum for wireless use in different bands, including cellular (800 MHz), PCS (1900 MHz), and other bands. *Id.*

BROADBAND INFRASTRUCTURE: A CATALYST FOR GDP AND JOB GROWTH 2013-2017 1 (Sept. 2013).[4] Indeed, over 28,000 of those jobs are directly attributable to investment in wireless broadband deployment. *Id.* Broadband also gives consumers new choices in how they live, work, and communicate – it makes "telemedicine" and distance learning possible; streamlines access to government information, programs, and services; and enables individuals to more effectively connect and interact with others. *See* Broadband for America, *What Is Broadband.*[5] And broadband plays a vital role in public safety and homeland security, by "allowing first responders to send and receive video and data," "ensuring all Americans can access emergency services," and "improving the way Americans are notified about emergencies." NATIONAL BROADBAND PLAN at xiv.

But there is still work to be done. As many as 19 million Americans still lack access to broadband, and 14.5 million of those are rural Americans. *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans*, Eighth Broadband Progress Report, 27 FCC Rcd. 10342, 10344-46, 10369 (2012). Wireless broadband is helping to solve this problem,[6] as it allows for mobility and covers

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[4] *Available at* http://www.pcia.com/images/IAE_Infrastructure_and_Economy_Fall_2013.PDF.

[5] *Available at* http://www.broadbandforamerica.com/about-broadband/broadband (last visited June 27, 2014).

[6] Broadband can be provided over different platforms, including cable, fiber, or radio spectrum (wireless). *See* FCC, *Getting Broadband, available at* http://www.fcc.gov/guides/getting-broadband (last visited June 29, 2014).

more people at lower cost. FCC OMNIBUS BROADBAND INITIATIVE, THE BROADBAND AVAILABILITY GAP, OBI Technical Paper No. 1 13, 39, 61 (Apr. 2010).[7] Indeed, wireless broadband in rural and underserved areas helps bridge the broadband gap – the difference between the number of Americans who have access to high-speed Internet service and those who still lack access to broadband. *E.g.*, Cellular South, Inc. & Telepak Networks, Inc., Reply Comments, WC Docket No. 13-184, at 6-7 (Nov. 8, 2013);[8] *Eighth Broadband Progress Report*, 27 FCC Rcd. at 10369. Demand for and reliance on wireless broadband services also continues to explode: mobile data traffic grew 77% in North America in 2013, and will increase seven-fold between 2013 and 2019. CISCO, CISCO VISUAL NETWORKING INDEX: GLOBAL MOBILE DATA TRAFFIC FORECAST UPDATE, 2013–2018 4 (Feb. 5, 2014);[9] ERICSSON, ERICSSON MOBILITY REPORT: ON THE PULSE OF THE NETWORKED SOCIETY 12 (Nov. 2013).[10]

Wireless broadband networks power today's smartphones, which allow people to carry in their pockets massive quantities of information – "millions

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[7] *Available at* http://download.broadband.gov/plan/the-broadband-availability-gap-obi-technical-paper-no-1.pdf.

[8] *Available at* http://apps.fcc.gov/ecfs/document/view?id=7520957194.

[9] *Available at* http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.pdf.

[10] *Available at* http://www.ericsson.com/res/docs/2013/ericsson-mobility-report-november-2013.pdf.

of pages of text, thousands of pictures, . . . hundreds of videos" – as well as "tools for managing detailed information about all aspects of a person's life." *Riley v. California*, No. 13-132, slip op. at 18, 20 (U.S. June 25, 2014). Given the considerable benefits of wireless broadband, the NATIONAL BROADBAND PLAN recognizes that "[t]he United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation." NATIONAL BROADBAND PLAN at xiv. And echoing President Bush's call for "universal, affordable access for broadband technology," President Obama has set a goal providing at least 98% of Americans with access to wireless broadband by 2016. Remarks in Albuquerque, New Mexico, 40 WEEKLY COMP. PRES. DOC. 477, 484 (Mar. 26, 2004);[11] Fact Sheet, *President Obama's Plan to Win the Future through the Wireless Innovation and Infrastructure Initiative* (Feb. 10, 2011).[12] America's wireless and infrastructure providers are working hard to meet these national broadband goals, but critical challenges remain.

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[11] *Available at* http://www.gpo.gov/fdsys/pkg/WCPD-2004-03-29/pdf/WCPD-2004-03-29-Pg477.pdf.

[12] *Available at* http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access (included in Press Release, The White House, President Obama Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011)).

B. Expanding Broadband Requires Towers and Other Diverse Wireless Infrastructure.

At the time of the 1996 Act, Congress recognized the need to promote "infrastructure investment." 47 U.S.C. § 1302. The reasons why are as clear today as they were then: near universal wireless broadband availability cannot be achieved without the ability to deploy new or improved wireless facilities, or "cell sites." *See* H.R. REP. NO. 104-204, at 94 (describing "the siting of . . . antennas, cell sites and other infrastructure-related equipment" as "necessary to provide efficient wireless telecommunications services to the public"); *accord Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, 14239 (2013) ("*Broadband Acceleration NPRM*"). As FCC Chairman Wheeler recently explained: "Simply put, we cannot have high-speed broadband if we do not have high-speed deployment." Letter from Tom Wheeler, Chairman, FCC, to The Honorable Fred Upton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (June 27, 2014).

Cell sites include antennas and other electronic equipment used to convey radio signals from phone to phone and from wireless devices to the Internet. To allow for clear signals over a broad coverage area, that equipment often must be placed high in the air. Sometimes that means attaching the equipment to a new support structure, like a communications tower. Other times it means "collocating" equipment, *i.e.*, placing it on an existing tower

or other structure, such as a building rooftop, water tank, or utility pole. The impact of broadband demand on the number of cell sites is reflected in data showing that the number of commercially operated cell sites in the United States has grown from around 22,000 at the time of the 1996 Act to more than 304,000 today. *See* CTIA – THE WIRELESS ASSOCIATION®, ANNUAL YEAR-END 2013 TOP-LINE SURVEY RESULTS 11 (2014).[13]

Antenna installations on towers and collocations on other tall structures (like rooftops) are often referred to as "macro" sites and form the core of the network, enabling wireless service providers to deliver voice, text, and broadband communications to today's wireless subscribers. Macro sites are effective for covering large geographic areas – for example, many towers used to build out America's wireless networks range between 150 and 200 feet and have a service area of several miles. Stanley D. Abrams, *Update on the 1996 Telecommunications Act: Personal Wireless Services*, LAND USE L. & ZONING DIG., Apr. 1998, at 5. Macro sites are also essential for meeting capacity demands, including in urban areas where the demand for wireless data usage continues to skyrocket.

Modern networks also use various smaller antenna technologies, such as Distributed Antenna Systems ("DAS") or "small cells," which are being deployed closer to the subscriber on structures such as utility poles and streetlamps as well as within

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[13] *Available at* http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2.

buildings. These technologies provide coverage in targeted locations and additional capacity to handle calls and data in areas with concentrated demands for wireless services. For example, a typical outdoor DAS antenna has a coverage range of less than half a mile, while an indoor small cell can have a coverage area as small as 33 feet. THE HETNET FORUM, DISTRIBUTED ANTENNA SYSTEMS (DAS) AND SMALL CELL TECHNOLOGIES DISTINGUISHED 6-9 (Feb. 4, 2013).[14]

These various solutions are not, however, interchangeable. Each has different characteristics and capacities that make it more or less suitable for deployment in specific environments and for resolving particular coverage and capacity challenges. *Id.* at 4.

Respondent the City of Roswell, Georgia ("the City") is therefore wrong when it suggests that towers will soon be rendered "dinosaurs," resulting in "fewer requests for these larger cellular towers as technology continues its progression," and therefore localities should be free to prefer other deployments like collocations and small cell technologies. Br. in Opp. 6-7, 18. While collocations, DAS, and small cells are all important to the fabric of the wireless landscape, they are complementary solutions that do not replace the need for towers. PCIA – The Wireless Infrastructure Association & The DAS Forum, Comments, WC Docket No. 11-59, at 11 (July 18, 2011) ("PCIA Accelerating Broadband NOI Com-

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[14] *Available at* http://www.thedasforum.org/wp-content/uploads/2014/07/DAS-and-Small-Cell-Technologies-Distinguished_HNForum.pdf.

ments");[15] *see Broadband Acceleration NPRM*, 28 FCC Rcd. at 14240 (noting DAS and small cells "supplement the capacity of the 'macrocell' network, filling in gaps or providing additional capacity in a localized outdoor or indoor area where adding a traditional macrocell would be impractical or inefficient"). Rather, projections indicate that 75% of mobile data network traffic growth will continue to be delivered over traditional macro sites, primarily towers, through 2017, while 25% will be carried by DAS and other small cell technologies. J. Sharpe Smith, *Towers Will Handle Most Mobile Data Growth in Next Five Years*, AGL MEDIA GROUP, Mar. 11, 2013.[16]

In fact, towers form the backbone of the nation's wireless infrastructure and remain critical to deploying next generation wireless services like broadband, particularly in rural and underserved areas where towers can generally cover larger territory. Indeed, it has been estimated that some 40,000 towers are needed to expand wireless broadband to virtually all Americans. Julius Genachowski, Chairman, FCC, Prepared Remarks at Broadband Acceleration Conference 4 (Feb. 9, 2011).[17] Sprint alone is expected to deploy some 15,000-18,000 new cell tower sites over the next few years, *Moody's:*

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[15] *Available at* http://apps.fcc.gov/ecfs/document/view?id=7021693804.

[16] *Available at* http://www.aglmediagroup.com/towers-will-handle-most-mobile-data-growth-in-next-five-years/.

[17] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A1.pdf.

Independent Towers Will Get an EBITDA Boost as Sprint Deploys Clearwire Spectrum, FIERCEWIRELESS TECH NEWSLETTER, Aug. 21, 2013,[18] and AT&T plans to deploy 10,000 new macro sites, including towers. PCIA, Press Release, *Experts Talk Small Cells at HetNet Forum Hill Event* (July 29, 2013).[19]

C. Numerous Barriers Delay Wireless Infrastructure Deployment.

Policymakers have long recognized that barriers to wireless infrastructure deployment frustrate national broadband priorities. In the period leading up to the 1996 Act, the House Commerce Committee found that "current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment" of advanced wireless services. H.R. REP. NO. 104-204, at 94. Nearly twenty years later, the FCC has acknowledged that "obtaining the necessary regulatory and zoning approvals from state and local authorities" remains a "significant constraint[]" to wireless infrastructure deployment. *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, Sixteenth Report, 28 FCC Rcd. 3700, 3908 (2013).

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[18] *Available at* http://www.fiercewireless.com/tech/press-releases/moodys-independent-towers-will-get-ebitda-boost-sprint-deploys-clearwire-sp.

[19] *Available at* http://www.pcia.com/pcia-press-releases/588-experts-talk-small-cells-at-pcia-hetnet-forum-hill-event.

These barriers have taken many forms, such as local permitting processes that "exclude the placement of poles altogether," "unnecessarily delay the process for that purpose," "favor one competitor over another," or "attempt to regulate on the basis of radio frequency emissions." 141 CONG. REC. H8269, H8274 (daily ed. Aug. 2, 1995) (statement of Rep. Goodlatte). Other barriers include: local moratoria on siting applications; unreasonable siting denials that result in protracted and costly litigation; high application fees; municipal property siting preferences; arbitrary evaluation of an applicant's business or technology choices; inconsistent or unclear application procedures; difficulty collocating facilities on existing structures; difficulty accessing space on poles or rights-of-way; and excessive costs to access those poles or rights-of-way. *See, e.g., Eighth Broadband Progress Report*, 27 FCC Rcd at 10404; *Broadband Acceleration NPRM*, 28 FCC Rcd. at 14240; *see generally* PCIA Accelerating Broadband NOI Comments.

These delays have real consequences. Even for localities with existing wireless coverage, delays can mean the inability to take advantage of new high-speed technologies or persistent gaps in coverage and dropped calls – including emergency calls. For localities without existing coverage, delays keep residents without these critical services altogether. Addressing these challenges has required a concerted, multi-year effort by policymakers to reduce barriers to wireless infrastructure deployment.

D. Policymakers Have Taken Steps to Remove Those Barriers, Including Adoption of Section 332(c)(7).

At the Congressional level, passage of the 1996 Act was an important initial step toward tearing down barriers to infrastructure deployment. Recognizing that the conflicting "patchwork" of state and local siting and zoning requirements "inhibit the deployment" of advanced wireless networks that would benefit consumers, H.R. REP. NO. 104-204, at 94, Congress acted to "remove barriers to infrastructure investment" and "accelerate rapidly private sector deployment of advanced telecommunications." 47 U.S.C. § 1302; H.R. REP. NO. 104-458, at 113 (Conf. Rep.). As this Court has explained, Congress sought to "promote competition and higher quality in American telecommunications services" and "'encourage the rapid deployment of new telecommunications technologies'" by reducing "impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (citation omitted).

To achieve these goals, Congress took a balanced approach that "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification" of wireless facilities, *Abrams*, 544 U.S. at 115, without preempting that authority altogether. *See* 47 U.S.C. § 332(c)(7); H.R. REP. NO. 104-458, at 207-08 (Conf. Rep.). Specifically, the 1996 Act added Section 332(c)(7) to the Communications Act. The provision forbids state or local governments

from unreasonably discriminating among providers of wireless services or prohibiting the provision of wireless services; requires action on a wireless siting application "within a reasonable period of time;" and prohibits the denial of an application on the basis of radio frequency emissions if the provider complies with FCC regulations on that subject. 47 U.S.C. § 332(c)(7)(B)(i)-(ii), (iv).

As particularly relevant here, Section 332(c)(7) also provides that "[a]ny decision" by a state or local government to deny a wireless service facility siting request "shall be in writing and supported by substantial evidence contained in a written record." *Id.* § 332(c)(7)(B)(iii). Any person aggrieved by such a denial can file suit "in any court of competent jurisdiction" within thirty days, and "[t]he court shall hear and decide such action on an expedited basis." *Id.* § 332(c)(7)(B)(v).

Importantly, these provisions created a clear right to "direct and expedited federal judicial review without any need to exhaust state remedies" – a right that did not exist before the 1996 Act. *Omnipoint Holdings, Inc. v. City of Cranston*, 2007 U.S. Dist. LEXIS 50672, *6 (D.R.I. July 12, 2007) (internal quotation marks and citation omitted), *aff'd*, 586 F.3d 38 (1st Cir. 2009). As a consequence, "[s]tate courts no longer provide the only avenue of relief for telecommunications carriers that have lost before local land use agencies." *See Smart SMR v. Borough of Fair Lawn Bd. of Adjustment*, 704 A.2d 1271, 1280 (N.J. 1998). The statute also replaced the traditional deference previously afforded to local zoning decisions under a standard of rational review with a

more exacting standard that requires substantial evidence. *See Global Tower, LLC v. Hamilton Twp.*, 897 F. Supp. 2d 237, 270-74 (M.D. Pa. 2012). Thus, Section 332(c)(7) took a number of steps to address siting delays on both the front end – *e.g.*, by requiring action on siting applications within a "reasonable" time and precluding discriminatory siting decisions – and on the back end, by providing for expedited court review of siting denials.

Congress has taken other steps as well. It adopted Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, which requires local or state governments to approve certain types of facilities siting applications "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law." 112 Pub. L. No. 96, § 6409(a)(1), 126 Stat. 156, 232, (2012), *codified at* 47 U.S.C. § 1455(a)(1). Section 6409(a) provides that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." 47 U.S.C. § 1455(a).

The FCC also has taken significant steps to reduce barriers to wireless infrastructure investment. In 2009, for example, the FCC interpreted provisions in Section 332(c)(7) to adopt the "Shot Clock," establishing 90 days as a reasonable time for zoning decisions regarding collocations, and 150 days for other local siting decisions. *Petition for Declaratory Ruling to Clarify Provisions of Section*

332(c)(7)(B) to Ensure Timely Siting Review, Declaratory Ruling, 24 FCC Rcd. 13994, 13995 (2009), *recon. denied*, 25 FCC Rcd. 11157 (2010), *aff'd sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013). The FCC acted in response to evidence that some delays in acting on wireless siting applications were egregious: evidence at the time indicated that out of more than 3,300 pending applications, 760 had been pending for over a year and more than 180 had been pending for more than three years. 24 FCC Rcd. at 14005.

More recently, the FCC took steps to help ensure timely and rationally priced access to utility poles, including the attachment of wireless antennas on pole tops. *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 (2011), *aff'd sub nom. American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013). And just last year, the FCC announced a "Broadband Acceleration Initiative" designed to "remove barriers to broadband build-out, including streamlining the deployment of mobile broadband infrastructure." FCC, News Release, *Chairman Julius Genachowski Announces New Broadband Acceleration Initiative Actions* (Jan. 25, 2013).[20] As part of that initiative, the FCC is examining ways to "reduc[e], where appropriate, the cost and delay associated with the deployment" of wireless infrastructure. *Broadband Acceleration NPRM*, 28 FCC Rcd. at 14241.

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[20] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-318589A1.pdf.

Against this backdrop, the need for the Section 332(c)(7)(B)(iii) protections at issue here becomes clear. Not only do providers face siting delays at the outset – delays the Shot Clock and Section 6409(a), for example, are intended to help address – they also face back-end delays when siting applications are denied and providers seek redress in the courts. It is critical that written decisions explain the grounds for denial in order to minimize those delays and facilitate expeditious and meaningful court review.

II. THE MAJORITY APPROACH TO SECTION 332(c)(7) IS CLEARLY CORRECT.

A. The Majority Approach Is Consistent With the Statute and Advances National Broadband Priorities.

The majority of Circuits to address the issue have correctly found that "for a decision . . . denying a [siting] request . . . to be 'in writing' for the purposes of 47 U.S.C. § 332(c)(7)(B)(iii), it must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *accord Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 722-23 (9th Cir. 2005); *see Helcher v. Dearborn County Bd. of Zoning Appeals*, 595 F.3d 710, 718-19 (7th Cir.

2010) ("We join the First, Sixth and Ninth Circuits, the majority of the courts that have reached this issue."). Consistent with the statutory text and its purpose, this Court should hold that the statute requires local governments to explain in their written denials the reasons for rejecting a permit or other siting application.

First, the majority view is consistent with the statutory text, which requires a "decision . . . in writing" that is "supported by substantial evidence contained in a written record" and allows court review "on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(iii), (v). The phrase "substantial evidence contained in a written record" has an established meaning in administrative law – one which Congress intended to apply here. *See* H.R. REP. NO. 104-458, at 208 (Conf. Rep.). Specifically, it "prohibits a court from affirming an agency on grounds other than those the agency gave in its decision." *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21 (1st Cir. 2002) (citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). By requiring more than a mere notification, but rather a written "decision," *see* Pet. Br. at 24-25, Congress sought to ensure that courts can properly assess whether a locality's grounds for denial are supported by substantial evidence. *See Helcher*, 595 F.3d at 719; *see also State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, *on the basis articulated by the agency itself.*") (emphasis added). The minority view advanced by the Eleventh and Fourth Circuits, permitting written denials without explanation in reliance only on the record, *see* Pet.

App. 12a-18a; *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d 423, 429-31 (4th Cir. 1998), makes compliance with this standard impossible.

A decision that does not contain an explanation of its reasoning is also in "direct tension" with the statute's requirement that judicial review be conducted on an expedited basis. *MetroPCS*, 400 F.3d at 722. It is well established that a statute must be read in context. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"). Courts cannot conduct their "substantial evidence" review on an "expedited basis" if they lack a written explanation of the reasons for a siting denial and must methodically sort through potentially contradictory evidence in the record in an effort to reconstruct what the rationale might have been. Rather, "[i]f such an evidentiary review is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record." *MetroPCS*, 400 F.3d at 722; *see Todd*, 244 F.3d at 60; *New Par*, 301 F.3d at 395-96.

A written explanation is particularly important because the statute forbids localities from regulating tower siting on certain grounds. Specifically, it forbids such regulation "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the FCC's regulations concerning such emissions." 47 U.S.C.

§ 332(c)(7)(B)(iv). If the record contained public testimony voicing concerns about radio frequency emissions as well as other issues, a court would be unable to determine whether or not the denial of a zoning request was based on prohibited grounds without a written explanation.

The majority view is also consistent with the underlying purpose of the statute. "Context here . . . makes clear that Congress saw a national problem, namely, an 'inconsistent and, at times, conflicting patchwork' of state and local siting requirements, which threatened 'the deployment' of a national wireless communication system." *Abrams*, 544 U.S. at 127-28 (Breyer, J., concurring, joined by O'Connor, Souter & Ginsburg, JJ.) (quoting H.R. REP. NO. 104-204, at 94). Faced with this problem, Congress passed the 1996 Act, including Section 332(c)(7), to "accelerate . . . deployment of advanced telecommunications" and "remove barriers to infrastructure investment." H.R. REP. NO. 104-458, at 113 (Conf. Rep.); 47 U.S.C. § 1302. Here, requiring localities to explain in writing the reasons for denying a siting application creates a consistent and predictable rule that benefits local planners as well as deployment while still respecting local zoning authority. In turn, court review can continue apace, and providers can receive a final decision on their siting applications in the expedited manner Congress intended. By saving time and money for all involved, providers can more quickly move to invest in infrastructure – not litigation – needed to speed deployment and achieve Congress' wireless broadband goals.

Finally, the City has suggested that a court faced with a deficient written decision could simply send it back to the locality for a better one, Br. in Opp. 8, 20, but this creates a vicious cycle of delay that would make a mockery of Congress' design. In any case, the remedy for a deficient writing in violation of Section 332(c)(7) is an injunction directing the issuance of the permit, not remand. *Nat'l Tower, LLC*, 297 F.3d at 21-22 ("Congress did not intend multiple rounds of decisions and litigation, in which a court rejects one reason and then gives the board the opportunity, if it chooses, to proffer another. Instead, . . . the proper remedy for a zoning board decision that violates the Act will be an order . . . instructing the board to authorize construction."); *see Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999); *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 410 (3d Cir. 1999); *New Par*, 301 F.3d at 399-400; *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002); *see also Illinois RSA No. 3 v. County of Peoria*, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (remand would "be a waste of time and would frustrate the Telecom Act's direction to expedite [remedial] proceedings").

B. The Majority Approach Does Not Infringe on Local Decision-Making.

Contrary to the City's assertions, a locality's decision-making authority over zoning matters is not at issue in this case. Adoption of the majority approach would not affect "the sanctity of the local zoning decision," "trump local government authority in land use decisions," or "strip[] . . . local authority." Br. in Opp. 7-8, 20, 22. Rather, it would simply make

uniform the requirement that siting denials contain written explanations supported by the record sufficient to permit meaningful judicial review. This requirement does not dictate any particular outcome – it simply means that localities must explain themselves in a written decision and have a record to back it up.

Nor would adoption of the majority approach force localities "to allow cellular towers in the heart of their residential communities based upon a mere technicality." Br. in Opp. 2, 19-20. To the contrary, applying the majority approach nationwide would create a clear, consistent roadmap for all localities, no matter their location, that would allow them to avoid the very "technical misteps" the City is concerned about. That is, they will be on notice that a written decision that explains the grounds for denial will satisfy the "in writing" requirement of Section 332(c)(7)(B)(iii). This is not a "travesty of justice," Br. in Opp. 20, but rather a needed clarification that will advance congressional broadband deployment goals by providing uniform rules of the road for localities that issue siting decisions, providers that are bound by them, and courts that must review them.

C. The Eleventh Circuit Ruling Invites Delay, Not Expedition.

The City is wrong when it suggests that the Eleventh Circuit ruling does not harm the telecommunications industry. Br. in Opp. 18-19. In fact, the ruling invites the exact delay and obfuscation that Congress tried to prevent – results that would only be magnified if extended nationwide.

First, the ruling delays judicial review, rather than expedites it, because courts must sift through the record to determine the reasons for denials and whether they are supported by substantial evidence. As the district court explained: "Absent some explanation of the rationale for the City Council's denial of petitioner's application, the Court is left to review this voluminous record without any guidance as to what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why." Pet. App. 32a; *see also, e.g.*, *Couveau v. Am. Airlines*, 218 F.3d 1078, 1081 (9th Cir. 2000) (explaining that an order that fails to disclose reasons "runs contrary to the interest of judicial efficiency" by compelling the court to "scour the record in order to find evidence in support of [the] decision") (internal quotation omitted); JUDICIAL CONFERENCE OF THE UNITED STATES, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 1-2, 5, 8 (Sept. 2010) (stating that "effective and efficient" use of resources is important to the judiciary's ability to perform its mission effectively at a time of "overburdened and congested courts").[21]

While the City contends that courts can simply look to the minutes or transcripts of siting hearings to determine "the reasons or specific rationale" for a denial, Br. in Opp. 19-20, it is often unclear which if any reasons the body as a whole (or a majority thereof) endorses as grounds for denial. *E.g.*, *Todd*, 244 F.3d at 60 (explaining that relying solely on a written record "can create difficulties in deter-

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[21] *Available at* http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf.

mining the rationale behind a board's decision"); *see also* Pet. Br. at 14. For this reason, the district court found that the record below "reflects a number of different reasons that may have motivated individual Council members to vote to deny petitioner's application," and "it is impossible for the Court to discern which of these reasons motivated the Council as a whole or commanded the support of a majority of the Council members." Pet. App. 30a.

Indeed, the Eleventh Circuit ruling circumvents the Congressional scheme by allowing localities to deny requests even when there is no majority supporting *any* rationale for rejection. If, for example, a five-person local board votes 3-2 in favor of denial, but each member of the majority expresses different concerns, then a reviewing court is left with no rationale that formed the basis for denial by the majority. So not only will a reviewing court have a hard time divining the board's reasoning, there literally will be no board reasoning to evaluate.

In addition, the ruling invites localities to obscure the reasons for their decisions and make them harder to interpret, creating a new barrier to deployment. The more vague or muddled a locality's reason(s) for denial, the harder it is to find error in its issuance. Localities would therefore be incented to merely stamp the word "denied" on applications, as in the Fourth Circuit, *see AT&T Wireless*, 155 F.3d at 429-30 – burying their reasons deep in the record to conceal, rather than illuminate, their thinking to make their decisions less susceptible to challenge or deter challenges altogether. The net result is more complex, time-consuming litigation,

greater uncertainty, and increased costs for all parties, which frustrates the statute and national broadband priorities. This outcome runs counter to Congressional intent.

CONCLUSION

For the foregoing reasons, the Court should adopt the approach of the majority of the Circuits and reverse the Eleventh Circuit ruling.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* TOWERCOM V, LLC

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INTERESTS OF AMICUS CURIAE[1]

TowerCom V, LLC ("TowerCom") sites, constructs, and operates cell towers for telecommunications carriers in Florida, Georgia, and North Carolina. Like the Petitioner, TowerCom must obtain permits from local governments for its cell towers. And like the Petitioner, TowerCom has an interest in seeing the Eleventh Circuit's decision in *T-Mobile South, LLC v. City of Roswell, Ga.*, 731 F.3d 1213 (11th Cir. 2013) overturned. Allowing local governments to simply stamp "denied" on permit applications, provide boilerplate language, or cross-reference to often confusing meeting minutes would subvert the very purpose of the Telecommunications Act of 1996's "in writing" requirement. 47 U.S.C. § 332(c)(7)(B)(iii). This would ultimately frustrate Congress's intent to "accelerate rapidly private sector deployment of advance telecommunications and information technologies and service to all Americans" for the reasons noted in the Petitioner's initial brief. H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.) *reprinted* in 1996 U.S.C.C.A.N. 124; *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 857 (1997) ("The Telecommunications Act of 1996 was an unusually important legislative enactment. As

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[1] In accordance with Rule 37.2 of the Rules of the Supreme Court, counsel for the Petitioner and the Respondent received timely, written notice of TowerCom's intent to file this brief. On July 1, 2014, counsel for both parties provided a joint letter to the Court consenting to this and other amicus curiae briefs. No counsel for a party authored TowerCom's brief in whole or in part, and no person, other than TowerCom or its counsel, made any monetary contribution to the preparation or submission of this brief.

stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage the rapid deployment of new telecommunications technologies.") (internal citations omitted).

TowerCom writes separately to highlight its recent experience with the Telecommunications Act's "in writing" requirement. This experience is detailed in *TowerCom V, LLC v. City of College Park, Ga., No. 1:13-cv-530-SCJ,* 2013 U.S. Dist. Lexis 126534, 2013 WL 4714203 (N.D. Ga. Aug. 21, 2013) [hereinafter *City of College Park*], which was decided shortly before the Eleventh Circuit's decision now before this Court. *City of College Park* provides a specific example of the types of absurd results that the Eleventh Circuit's decision would allow to the detriment of TowerCom and similar companies, and to the detriment of Congress's goal of ensuring that *all* Americans have access to quality, wireless telecommunications services.

SUMMARY OF THE ARGUMENT

Cell towers are essential infrastructure – they make it possible for Americans to have critical wireless telecommunications services. Yet, as here, "an outpouring of public opposition" through "letters, e-mails, and petition signatures" often makes it difficult to site, construct, and operate cell towers. *T-Mobile South,* 731 F.3d at 1215. In such instances, local governments, typically acting through elected officials, have every incentive to pacify their constituents by denying applications for cell tower permits. The Telecommunications Act, however, places substantive and procedural

limitations on the ability of local governments to do just this. *See* 47 U.S.C. § 332(c)(7)(B).

The Telecommunications Act's limitations rely on the ability of reviewing courts to understand the basis for the local government's decision. Absent a separate, written explanation for local government decisions, courts would be hard-pressed to provide meaningful review – to determine whether local governments complied with the Act's limitations. Without that explanation, local governments would have every opportunity to mask the true rationale for their denials of cell tower permit applications. Many telecommunications providers might simply shy away from the cost and uncertainty of litigation to discover this true rationale, abandoning plans to fill gaps in services. Others, like TowerCom, might slog through the litigation – delaying access to even the most basic emergency 911 services – only to be confronted with after-the-fact rationales that rely on snippets from public comments or the minutes of collegial bodies acting on behalf of the local governments. Either way, access to wireless telecommunications services would suffer.

Congress surely did not intend the Telecommunications Act's "in writing" requirement to be read in a way that would thwart its goal of rapidly deploying telecommunications services. Yet that is what the Eleventh Circuit's decision now condones. Accordingly, this Court should reverse the Eleventh Circuit's decision.

ARGUMENT

I. THE TELECOMMUNICATIONS ACT OF 1996 REQUIRES LOCAL GOVERNMENTS TO PROVIDE A SEPARATE, WRITTEN EXPLANATION OF THEIR DECISIONS.

Government should not do that which it cannot explain. The Court recognized this common sense principle for administrative agencies long ago in *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), and reiterated it more recently for federal, state, and local governments in *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). The Petitioner's initial brief makes clear that the Telecommunications Act's plain text and legislative history require much the same here. Indeed, TowerCom's experience shows that holding otherwise would lead to absurd results – it would force courts to engage in a game of pin the tail on the rationale. The Telecommunications Act cannot be read in a way that leads to absurd results, in a way that subverts Congress's clear and unequivocal intent by obfuscating judicial review and delaying the development of telecommunications technologies. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("it is a venerable principle that a law will not be interpreted to produce absurd results"); William Blackstone, *Commentaries on the Laws of England* § 2 at 60 (4th ed. 1770) ("where words bear . . . a very absurd significance, if literally understood, we must a little deviate from the received sense of them").

A. Meaningful judicial review requires a separate, written explanation.

The Telecommunications Act provides in relevant part that a local government's decision "to deny a request to place, construct, or modify [cell towers] shall be *in writing* and supported by *substantial evidence* contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii) (emphasis added). The Act's "in writing" and "substantial evidence" standards are inextricably intertwined. The Ninth Circuit has recognized that under the Telecommunications Act's "substantial evidence" standard "[i]f such an evidentiary review is to be undertaken at all," then "courts must at least be able to ascertain the basis of the zoning decision at issue." *MetroPCS, Inc. v. City & Cnty. of San Francisco,* 400 F.3d 715, 722 (9th Cir. 2005). Put another way, a "zoning decision must be sufficiently elaborated to permit this assessment" because "only then can [courts] accurately assess the basis of the zoning decision at issue." *Id.*; *see also Helcher v. Dearborn Cnty.,* 595 F.3d 710, 719 (7th Cir. 2010).[2] To find otherwise would allow a local government to thwart meaningful review under the "substantial evidence" standard by "provid[ing] the applicant with one reason for a denial and then, in court, seek[ing] to uphold its decision on different grounds." *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals,* 297 F.3d 14, 21 (1st Cir. 2002).

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[2] There, the Seventh Circuit specifically stated that "the primary purpose of the 'in writing' requirement for the Telecommunications Act is to allow for meaningful judicial review of the decisions of local governments." *Helcher,* 595 F.3d at 719.

This Court has recognized much the same for administrative agencies – both before and since Congress's enactment in 1946 of the Administrative Procedure Act, 5 U.S.C. §§ 500, *et seq.* In *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 294 U.S. 499, 511 (1935), for example, the Court said, "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941), the Court required the National Labor Relations Board to provide a sufficient explanation for its order, explaining that the "administrative process will best be vindicated by clarity in its exercise." The Court similarly stated in *Chenery* that "the orderly functioning of the process of [substantial evidence] review requires that the grounds upon which the administrative agency acted be clearly disclosed." *Chenery*, 318 U.S. at 94. And since Congress's enactment of the Administrative Procedure Act, this Court has required federal agencies to "articulate a satisfactory explanation for its action" so that a court may review whether the action is "supported by substantial evidence on the record considered as a whole." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Life. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (internal citations omitted). "*Post hoc* rationalizations for agency action" simply will not do. *Id.* at 50.

To be sure, this Court's administrative law precedents have great relevance under the Telecommunications Act because Congress intended the Telecommunications Act's "substantial evidence" standard to be "the traditional standard used for judicial review of agency action." H.R. Rep. No. 104-

458, at 208. Even the Eleventh Circuit recognized as much in *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1218 (11th Cir. 2002). Thus, if "[t]he requirement of written findings and conclusions, coupled with a statement of reasons, is *indispensably necessary* so far as administrative agencies" are concerned, then it follows that local governments should not be held to a lesser standard. Att'y Gen. Comm. on Admin. P., Final Rep., at 30 (Jan. 21, 1941) (emphasis added). As the Petitioner notes, holding otherwise would sanction gamesmanship from local governments, force telecommunications providers to file lawsuits in search of a rationale, and delay the rapid deployment of telecommunications services.

B. TowerCom's recent experience with the Act's "in writing" requirement.

TowerCom's experience in *City of College Park* proves that the Petitioner's concerns are very real. In *City of College Park*, TowerCom sued the city after it denied TowerCom's application for a cell tower. *City of College Park,* 2013 U.S. Dist. Lexis 126534 at *1. Specifically, the case "stem[med] from TowerCom's proposal to construct a 147-foot cellular monopole tower" near the Atlanta Airport. *Id.* at *2. Among other things, TowerCom chose the specific site to fill a gap in wireless service that prevented some "residential and commercial customers from reaching emergency 911 services." *Id.*

Months after TowerCom filed its application for the cell tower, the city planner issued a staff report recommending that the city deny TowerCom's

application. *Id.* at *4. According to the staff report, the proposed cell tower fell within a "special corridor" under the city's nonbinding comprehensive plan for future development. *Id.* at *4-5. The staff report concluded that the tower would be inconsistent with the "vision" for this special corridor even though it "would not detract from the aesthetic appeal and design character of *existing* uses in the area." *Id.* at *6 n.3 (emphasis in original).

Again, several months later, the mayor and city council held a public meeting on TowerCom's application. *Id.* at *8. At that meeting, TowerCom pled its case, provided additional supplements to counter the staff recommendation, and otherwise made its representatives available for questioning. *Id.* There were few questions from the mayor or council members and only a single public commenter who opposed the proposal because he thought the tower "would only serve commuters using the nearby interstate." *Id.* Acting as a collegial body, the mayor and council members then denied TowerCom's application without offering any reason for their decision. *Id.*

Ten days later, TowerCom asked the city for a written decision. *Id.* The city did not provide one. *Id.* A week later, TowerCom again asked for a written decision. *Id.* This time, the city offered two boilerplate sentences, noting only that a hearing was held on TowerCom's application and that the application was denied. *Id.* at *9. TowerCom then filed suit in federal district court, arguing among other things that the city failed to abide by the Telecommunications Act's requirement that its

decision "to deny a request to place, construct, or modify [cell towers] shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii).

Believing the city's staff report provided justification for the city's decision, TowerCom focused its attack on the staff report and established two things. First, TowerCom established that the comprehensive plan referenced in the staff report showed that the proposed cell tower site did not actually fall within the special corridor whose future aesthetic character served as the basis for recommending denial of TowerCom's application. *City of College Park,* 2013 U.S. Dist. Lexis 126534 at *1. So, concerns about the corridor's future plans were misplaced. *Id.* Second, even if the site did fall within the special corridor, the comprehensive plan specifically contemplated the area would benefit from improved telecommunications services to help with the area's excessive 911-call volume and urban blight. *Id.* at *7. Stated differently, TowerCom showed that the cell tower would be consistent with the comprehensive plan's vision for the nearby corridor. *Id.*

In its responsive filings, the city completely abandoned the rationale provided in its staff report. *Id.* at *19 n.9. Instead, for the very first time, the city seized on snippets of TowerCom's presentation to the mayor and city council and argued a new and separate ground for denying TowerCom's application: the proposed cell tower's height. *Id.* at *22-24. Fortunately for TowerCom, the record provided little, if any, support for the city's new

rationale for denying TowerCom's application. *Id.* After considering the case on an expedited basis as required by the Telecommunications Act, the district court thus reversed the city's decision almost a year after the city issued its initial staff report. *Id.* at *37-38. The court did so on three separate grounds, one of which was the city's failure to satisfy the "in writing" requirement, and another was the city's failure to support its decision through "substantial evidence" in the record. *Id.*

Despite TowerCom's success on the merits in *City of College Park*, the case stands as a cautionary tale. For nearly a year, TowerCom had to delay the permitting (which is separate and apart from the construction) of a cell tower necessary to fill a gap in emergency 911-coverage. TowerCom had to incur the expense and uncertainty of litigation to understand the rationale for the city's decision; it had to sue the city to pin down *possible* rationales that ranged from a desire to prohibit all cell towers near residential areas to waiting for a new city ordinance that charged annual fees "pegged to the amount of data that passes through a particular cellular tower." *Id.* at *7. And based on the standard subsequently announced by the Eleventh Circuit, the case might yet have turned out differently had the city (or public commentators) thrown enough dots into the record for the city to connect as the *post hoc* rationale for its decision. Regardless, Congress's intent to "accelerate rapidly private sector deployment of advance telecommunications and information technologies and service to all Americans" was subverted, H.R. Rep. No. 104-458, at 113, through what the First

Circuit has called "purposeful obscurity." *Nat'l Tower*, 297 F.3d at 23.

CONCLUSION

Obtaining cell tower permits from local governments is difficult. Submittals ranging from engineering drawings to landscape plans, meetings with staff and counsel, responses to requests for additional information, and a seemingly endless stream of written explanations from the applicant to the local government are the norm. It seems only appropriate for local governments to provide a separate, written explanation of their decisions. Indeed, to ensure consistency with Justice Holmes's admonition that "men must turn square corners when they deal with the government," it is only fair that the government should be held "to a like standard of rectangular rectitude when dealing with its citizens." John M. Maguire & Philip Ziment, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv. L. Rev. 1281, 1301 (1935). The Eleventh Circuit's decision should thus be reversed and the Telecommunications Act's "in writing" requirement given the effect that Congress intended.

Respectfully submitted.

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